Supreme Court of India
Kushalbhai Mahojibhai Patel vs A Firm Of Mohmadhussain Rahimbux on 11 March, 1980
Equivalent citations: 1981 AIR 977, 1980 SCR (3) 22
Author: A Koshal
Bench: Koshal, A.D.

PETITIONER:
KUSHALBHAI MAHOJIBHAI PATEL

Vs.

RESPONDENT:
A FIRM OF MOHMADHUSSAIN RAHIMBUX

DATE OF JUDGMENT11/03/1980

BENCH:
KOSHAL, A.D.
BENCH:
KOSHAL, A.D.
FAZALALI, SYED MURTAZA

CITATION:
1981 AIR 977 1980 SCR (3) 22

ACT:
Privity of Contract-Supply made by appellant Plaintiff to respondent defendant of 268 Bengali Maunds of Tobacco and accepted by the latter-Four cheques issued by the latter covering the value bumped-No document was executed to evidence the contract-Whether suit for recovery of money is maintainable, for want of privity of contract?- Onus of proof is on the defendant in such cases by producing best evidence like Books of Accounts.

HEADNOTE:
In the money suit filed by the appellant-plaintiff to recover the value of tobacco sold to respondent-defendant after the four cheques covering the value of tobacco and issued by latter bumped, the defendant took a plea of nonexistence of privity of contract and while admitting both the receipt of the tobacco from and issuance of cheques to plaintiff, explained the tobacco had been supplied to defendant by the plaintiff at the instance of another Firm R. K. Patel with whom the defendant had placed the order for the supply of the tobacco and that the four cheques were issued in favour of plaintiff at the instance of Firm "R. K. Patel", in respect of another transaction for the supply by that Firm of 900 bags of tobacco, which transaction later failed.

The Trial Court decreed the suit after rejecting the evidence and pleadings of the defendant. In appeal the High Court reversed the judgment and set aside decree of the trial Court.

Allowing the appeal by certificate, the Court

^

HELD : Supply of the goods by the plaintiff to the defendant and the issuance of cheques by the latter in favour of the former shifted the onus of proof on the point of privity of contract to the defendant. The fact that the goods had been sent to the defendant by the plaintiff and had been received by the former was admitted on all hands and was sufficient to raise a presumption, till the contrary was proved, that an order had been placed for the supply of the goods with the plaintiff by the defendant firm. The plaintiff could thus bank on the said fact for the purpose of discharging the initial onus which lay on him to prove the privity of contract between the parties and it was for the defendant to rebut the presumption which the fact raised. [27 G-H, 28 A]

(ii) The books of account maintained by the defendant being the best evidence available in proof of the stand of the defendant firm that no order had been placed by it with the plaintiff the failure of the defendant to place on record those books is a clincher. Non production of these books by the defendant raises a presumption against it that if such evidence had been produced, the same would have gone against the case propounded by it, more

23

so when the defendant fails to bring witnesses to the transactions set up by it into witness-box and examine them. [28 A-C, 29 A-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1376 of 1970.

From the Judgment and Decree dated 29th/30th October, 1969 of the Gujarat High Court in Appeal No. 795/61.

D. V. Patel, T. U. Mehta and M. V. Goswami for the Appellant.

Dr. W. S. Barlingay and A. G. Ratnaparkhi for the Respondent.

The Judgment of the Court was delivered by KOSHAL, J-This appeal by certificate granted by the High Court of Gujarat under sub-clause (a) of clause (1) of Article 133 of the Constitution of India is directed against its judgment dated the 29th/30th October, 1969, accepting a first appeal preferred by the defendant firm to it and dismissing the plaintiff's suit which had been decreed by the trial

court.

2. The said suit was filed on the 24th November, 1958, in the court of the Civil Judge, Senior Division, Nadiad, by one K. M. Patel for the recovery of Rs. 38,718/- from the defendant firm on account of the price of 225 bags of tobacco weighing 268 Bengali maunds at the rate of Rs. 112/- per such maund and interest thereon. The case set out in the plaint was that the tobacco in question had been purchased by the defendant firm on the 28th of November, 1955, that the same was despatched to the defendant firm by train from Anklav railway station on the 1st of December, 1955, on which date a bill for Rs. 30,523/- covering the price of the goods and incidental expenses was sent to the defendant firm, that the goods were received by the defendant firm who failed to pay for the same, that ultimately the defendant firm gave to the plaintiff four cheques, each for Rs. 5,000/- drawn on a banking company of Santa but that all of them were dishonoured on presentation. In addition to the said amount of Rs 30,523/-, the plaintiff claimed Rs. 8,195/- on account of interest at the rate of 9 per cent per annum for the period preceding the suit. He further prayed for award of future interest and costs.

3. The defendant firm denied the plaintiff's claim in toto. It averred in the written statement that no goods had been received by it from the plaintiff and that it had given no cheques to him. According to the defendant firm the goods in question had been purchased by it from a firm carrying on business in the name and style of `R. K. Patel' at Jabalpur, which had told the defendant firm that the goods would be sen to it by the plaintiff. In relation to the four cheques the defendant firm stated that on the 29th November, 1957, it had entered into a transaction for the purchase of 900 bags of tobacco from firm R. K. Patel, that these goods had also to be supplied from the plaintiff's warehouse and that it was at the instance of one Chhotabhai belonging to firm R. K. Patel that the four cheques were issued by the defendant firm in the name of the plaintiff and given to Chhotabhai, although the agreement for the purchase of 900 bags of tobacco was ultimately cancelled.

4. On the pleadings of the parties the main question which arose for determination was whether a privity of contract existed between them in relation to the sale and purchase of the goods in dispute in regard to which no document was admittedly executed.

5. At the trial the plaintiff examined only one witness besides himself. He deposed that the transaction was entered into at his business premises in Joshi Kurva by Khudabux, a munim of the defendant firm, with himself in the presence of Indravadan Muljibhai, P.W. 2 who supported that stand. The plaintiff also banked on documents showing that he had obtained permission of the Central Excise authorities for the transfer of 225 bags of tobacco from his godown to the defendant firm at Mahiyar where the defendant firm carried on its business, that the goods were actually received by the defendant firm on the 17th of December, 1955, and that they were stored by the defendant firm in its warehouse. The plaintiff produced his cash book which contained an entry (exhibit 54) indicating that an amount of Rs. 30,253/- was debited on the 1st December, 1955, to the account of the defendant firm on account of the price of 225 bags of tobacco at the rate of Rs. 112/- per Bengali maund and incidental expenses. The ledger entry (exhibit 55) conforms to the cash book entry.

On the other hand, Abdul Halim Haji Rahimbux, one of the partners of the defendant firm appeared as its sole witness who denied that any contract had been entered into by it with the plaintiff for the supply of the disputed tobacco through Khudabux or otherwise. According to the witness Khudabux was not an employee of the defendant firm at the relevant time although it was admitted that he had acted as a munim for the defendant firm earlier to and also some time after November, 1955. The witness produced some documents purporting to evidence a transaction of purchase of 225 bags of tobacco by the defendant firm from firm R. K. Patel. These documents consisted mainly of three letters and a bill. Letter exhibit 124 bears the date 19th November, 1955, and is signed by Chhotabhai. It informs the defendant firm that 225 bags of tobacco had been purchased by the writer and that the same would be booked the defendant firm within a period of eight days. Another letter (exhibit 125) is dated the 17th of December, 1955. This is also signed by Chhotabhai and states that the tobacco had already been despatched to the defendant firm. Bil exhibit 126 is dated 4th of January, 1956 and states the price of 225 bags of tobacco as Rs. 30,361-14-0. The only other letter worth mention is exhibit 119. It is dated the 13th September, 1958 and states that accounts had been settled between firm R. K. Patel and the defendant firm so that firm R. K. Patel owed a sum of Rs. 340-2-0 to the defendant firm. The letter specifically mentions that the disputed transaction formed part of the settlement of accounts.

6. In the above state of the evidence the trial court accepted the plea of the plaintiff that an order for the supply of the disputed tobacco was placed by the defendant firm with the plaintiff as alleged by the latter. The plaintiff was further held entitled to interest but at the reduced rate of 6 per cent per annum. The learned Civil Judge therefore granted to the plaintiff a decree for the recovery of Rs. 35,986.33 with proportionate costs of the suit and also directed that the plaintiff would receive interest at the said rate from the date of the suit till the date of realisation of the decretal amount.

7. The High Court did not believe the word of the plaintiff that an order had been placed with him by Khudabux acting on behalf of the defendant firm. In doing so the High Court gave reasons which may be summarised as under :

(i) The plaint did not mention that the defendant firm had placed the order in question through Khudabux acting as its agent.

(ii) Although the order was of considerable magnitude and the only transaction of its kind to be entered into between the parties it was not authenticated by Khudabux in writing.

(iii) The plaintiff would not have remained silent for two years in regard to the money due to him.

(iv) The evidence does not disclose any other occasion on which Khudabux may have acted as the agent of the defendant firm.

(v) Bill exhibit 56 and entries in the plaintiff's account books (exhibits 54 and 55) do not mention the name of Khudabux.

(vi) No letter from the defendant firm to the plaintiff acknowledging the receipt of the goods at Mahiyar has been placed on the record.

(vii) No notice of dishonour of the cheques was sent by the plaintiff to the defendant firm.

(viii) The plaintiff would not have sent the goods without demanding advance payment or earnest money.

(ix) Khudabux has not been produced by the plaintiff in the witness box. Plaintiff's own munim Ashabhai who is said to have been present at the time of the alleged agreement also does not figure as a witness.

(x) The testimony of Indravadan does not inspire confidence.

The High Court then took up for examination the evidence produced by the defendant firm and accepted letters exhibits 119, 124 and 125 as also bill exhibit 126 at their face value. In this connection the High Court remarked that it was difficult for it to imagine that the defendant firm could have manufactured the letter-heads of firm R. K. Patel. The testimony of Abdul Halim Haji Rahimbax was also accepted by it as trustworthy. It was urged before the High Court on behalf of the plaintiff that the failure of the defendant firm to produce its own account books and those of firm R. K. Patel, as well as Chhota-bhai, was fatal to its case. The argument was rejected with the observation that it was for the plaintiff to have the said account books produced and to examine Chhotabhai as a witness. It noted the admissions made by the defendant firm's own witness to the effect that Khudabux had been in its employment both before and after the transaction in dispute but remarked that there was nothing to indicate that Khudabux was in the employment of the defendant firm on the crucial date, i.e., the 28th of November, 1955, or that he had authority from the defendant firm to place the disputed order. It refused to believe that the railway receipt and the bill for the price of the goods (exhibit 56) along with the covering letter (exhibit 57) were sent by the plaintiff to the defendant firm at Mahiyar. It examined the account books of the plaintiff and rejected them as unreliable mainly on the grounds that the cash book was maintained in fortnightly instalments and not on a daily basis and that the four cheques above mentioned were made the subject matter of entries therein long after their issuance. The story of the cheques having been given to the plaintiff by the defendant firm in part payment of his dues was also discredited. In this connection it was observed :

> "....It is difficult for us to believe that if the plaintiff was suffering any damage at the instance of the defendant on account of the defendant on account of the dishonour of these cheques, he would have really remained content as if with trusting his destiny and trusting the defendant....if the plaintiff had obtained these cheques after making several attempts to recover the amount due to him, as he states in his deposition, he would have taken immediate action against the defendant after the dishonour of the cheques....". The High Court further remarked :

> "…. The cheques must have reached the plaintiff not directly from the defendant but through some other route and it is clear that he must have complained of their dishonour to the person from whom they arrived in his hands. His silence after the cheques were dishonoured also indicates in the same direction. Absence of any correspondence with the plaintiff throughout a period of more than two years also indicates in the same direction….".

Two main contentions were pointedly raised before the High Court: (1) that the supply of the goods by the plaintiff to the defendant firm and the issuance of cheques by the latter in a favour of the former shifted the onus of proof on the point of privity of contract to the defendant firm, and, (2) that the failure of the defendant firm to produce the best evidence which was available to it in the form of its own and firm R. K. Patel's account Books should have been treated as a clincher.

The first contention was turned down with the remark that the plaintiff could not be deemed to have discharged the initial onus which was on him to prove privity of contract because he had failed to put Khudabux in the witness-box. The second was repelled for the reason that the defendant firm could not be deemed to have withheld any document when there was no notice given by the plaintiff to it for production thereof.

8. It was in the above premises that the High Court passed the impugned judgment.

9. After hearing learned counsel for the parties at length we are of the opinion that the very approach of the High Court to the determination of the crucial question in the case, namely, that of privity of contract between the parties, is erroneous. The fact that the goods had been sent to the defendant firm by the plaintiff and had been received by the former was admitted on all hands and was sufficient to raise a presumption, till the contrary was proved, that an order had been placed for the supply of the goods with the plaintiff by the defendant firm; and it was immaterial whether the person actually placing the order was a partner of the defendant firm or a person authorised by it. The plaintiff could thus bank on the said fact for the purpose of discharging the initial onus which lay on him to prove privity of contract between the parties and it was for the defendant firm to rebut the presumption which the fact raised as stated above. In rejecting the first of the two main contentions raised before the High Court on behalf of the plaintiff, therefore, the High Court fell into a serious error.

The same is true of the second main contention which was raised by learned counsel for the plaintiff and was turned down by the High Court. In the circumstances of the case it was the duty of the defendant firm to place its books of account on record, those books being the best evidence available in proof of the stand of the defendant firm that no order had been placed by it with the plaintiff. The production of letters exhibits 119, 124 and 125 and bill exhibit 126 does not serve the purpose sought to be achieved. In the absence of such production they are loose documents which could have come into existence even after the suit was filed, if Chhotabhai chose to oblige the defendant firm and colluded with it. And there is intrinsic evidence available in letter exhibit 119 that such was the case. That letter purports to have come into existence on the 14th of September, 1958, i.e., about three months and a half after the defendant firm had been informed of the plaintiff's claim through a

notice dated the 27th of May, 1958, and that claim had been repudiated by the defendant firm. The contents of the letter are tell-tale and may be reproduced in extenso :

> "To "Bhai Mohammad Hussain Rahim Bux of Mahiar written from Jabalpur by R.K. Patel of Jabalpur whose salutations to you be pleased to accept. Further it is learnt that on the date 13-9-58 the account is made by the partner of our firm Shri Chhotabhai Patel upto the date 12-9-58 by taking into account the balance of Rs. 75/- seventy five at the end of 1954-55 and balance of Rs. 340-2-0 are found due by us. The same is agreed. The price of 225 bags of tobacco of Khushalbhai Mahijibhai Patel of Joshikuva (Anklav) is also included in the said account and so Rs. 340-2-0 are found balance payable by us including the said amount and if any dispute arises subsequently in the said account we shall be responsible in every way about the same. "It is respectfully to be stated that this note is written while in sound state of mind so that it may remain as authority and may become useful when required.
>
> "Chhotabhai Khushalbhai Patel "Partner R. K. Patel "Jabalpur "Date 14-9-58."
>
> Had the accounts been really settled as the letter claimed, there is no reason at all why a copy of the settlement, which must, in the very nature of things, have contained a statement of all the transactions covered by it was not furnished to the court. Such a statement must have been provided by firm R. K. Patel to the defendant firm who was entitled to scrutinize the correctness of the settlement and point out any inaccuracies therein to firm R. K. Patel.

Besides, we fail to understand why the transaction disputed before us came in for special mention in letter exhibit 119 when no other transaction covered by the settlement found a place therein. The conclusion is irresistible that the letter had been procured merely to serve as evidence in rebuttal of the plaintiff's case and not because any settlement really took place.

10. If the case propounded by the defendant firm at the trial is correct, its account books must be containing entries to the effect that the agreement of purchase of 225 bags of tobacco was entered into with firm R. K. Patel and not with the plaintiff and that some time in December, 1955, the account of firm R. K. Patel was credited with the amount of the price of the goods. Entries would further be available therein indicating unmistakably the periods for which Khudabux was admittedly employed with the defendant firm. The non-production of those books by the defendant firm and the production by it of stray letters and a bill constitute failure on its part to produce the best evidence and a presumption has therefore to be raised against it that if such evidence had been produced, the same would have gone against the case propounded by it. The matter does not end there. The failure of the defendant firm to bring Chhotabhai and Khudabux into the witness-box and the fact that it made no attempt to have the account books of firm R. K. Patel (the entries in which account would perhaps have clinched the matter in dispute) must be similarly construed and a presumption drawn that this evidence also would have gone against the defendant firm.

11. The view we have just above taken of the approach of the High Court is sufficient to dislodge its judgment and for a restoration of the decree passed by the trial court. We may add, however, that apart therefrom the impugned judgment suffers from another serious defect and that is that the appreciation of the evidence of the parties is based more on conjectures than logic. We may give a few instances. The absence of the name of Khudabux from the plaint is immaterial because pleadings are required merely to state facts and not the evidence through which they are to be proved. The relevant fact was that an agreement for the purchase of goods had been entered into by the defendant firm with the plaintiff. The manner in which that contract came into being was a matter of evidence which need not have formed part of the plaint. Again, the circumstances that the agreement of purchase was not reduced to writing, that Khudabux was not shown to have acted as the agent of the defendant firm on any other occasion and that the name of Khudabux does not appear in entries exhibits 54 and 55 do not disclose any abnormality when it is borne in mind that goods were actually supplied by the plaintiff to the defendant firm and were received by the latter. The other reasons given by the High Court in disbelieving the plaintiff's word that the order for the supply of goods had been placed with him by Khudabux are equally untenable. In this connection it is to be noted that no plausible reason can be found for the plaintiff recording in his books the name of the defendant firm as the purchaser if the goods had really been sold to firm R. K. Patel. We may point out that the name of the defendant firm as the purchaser is entered in the cash book maintained by the plaintiff and it is no reason at all for that book to be rejected as unreliable that it is maintained on a fortnightly and not daily basis. The failure of the plaintiff to demand advance payment or earnest money and to keep quiet for a long period of time are also not relevant matters in view of the admitted fact of the supply of the goods by the plaintiff to the defendant firm and its failure to produce on record its own books of account and those of firm R. K. Patel.

12. The four cheques issued by the defendant firm in favour of the plaintiff furnish another very important circumstance in derogation of the claim made by the former. The explanation furnished by its solitary witness that they were issued at the instance of Chhotabhai to whom they were delivered does not inspire confidence in us, the main reason therefor being again the non-production of the account books of the two firms-a reason which makes us repel as untenable the inference drawn by the High Court (from the plaintiff's failure to act immediately after the dishonour of the cheques) that "the cheques must have reached the plaintiff not directly from the defendant but through some other route".

13. There is no reason whatsoever for us to believe that if the case of the defendant firm was true the plaintiff would have made out the story given by him in the plaint, absolved the real debtor of the responsibility to pay and claimed his dues from some one not at all liable for them. Firm R. K. Patel being the party liable to the plaintiff, according to the case set up by the defendant firm, the plaintiff could not be expected to make false entries in this account books and file a suit not against firm R. K. Patel but against the defendant firm 14 For the reasons stated we have no hesitation in accepting this appeal, setting aside the impugned judgment and restoring the decree passed by the trial count with a direction that the plaintiff will be entitled to his costs throughout.

S R. Appeal allowed.