SUPREME COURT OF FIJI

Appellate Jurisdiction

JASODRA (d/o MUNDAU)

v.

FIJI SUGAR CORPORATION LIMITED

Appellate Jurisdiction

[Kermode. J. 1st February1979]

Claim for debt−admitted once owing−defendant's onus to prove payment

K C. Ramrakha for Appellant
J Singh & D. C. Maharaj for Respondent.

Appeal by plaintiff against Magistrate's decision dismissing her claim for a balance of account in the sum of $974. The learned Magistrate found that the evidence cast a doubt on the case of the plaintiff and dismissed the action.

In the appeal the question considered was upon which party in such a case the onus lay. It would appear in the instant case it had been admitted that the sum had been due; then the question remained should the plaintiff have to prove it had not been paid: or should the defendant have to prove it had paid.

Held: (Once it was admitted the sum was owing to the (plaintiff) appellant the burden of establishing payment

was on the defendant.

Appeal allowed.

Cases referred to:

Young v. Queensland Trustees Limited [1956] 99 C.L.R. 560 *Nelson v. Campbell* 1928 V. L. R. 364
Goodchild v. Pledge (836) 1 M & W363.(150 E.R.. 474)
Huyton with Roby Urban District Council v. Hunter [1955] 2 All E.R. 398

KERMODE, J.

Judgment

This is an appeal against the judgment of the Magistrates Court Labasa A delivered on the 4th August 1978 dismissing the appellant's claim against the Respondent Company.

The Appellant (plaintiff in the court below) claimed from the Respondent Company the sum of $974.00 (Nine Hundred and Seventy Four Dollars) being the balance sum of the delivery payments due in the month of November and December 1975 under the Sugar Cane Contract Number 2235 Vunimoli Sector, Labasa which sum the Defendant has failed to pay. The magistrate ordered that the Defendant file a Defence and this order was compiled with.

In its Defence the Respondent Company alleged that the sum of $974.00 claimed by the Plaintiff (appellant) was paid to her on the 24th December 1975 at the Vunimoli Sector Office. It admitted that the said payment to $974.00 represented the nett sugar cane proceeds payable by the Respondent at that time to the Appellant.

Ignoring for the time being the issue as to whether the $974.00 was in fact paid to the appellant on the 24th December1975 on the pleadings there was no dispute that prior to that date the respondent company was indebted to the appellant in the sum of $974.00 being the nett cane proceeds payable by the responden. to the appellant

The main issue which arose for determination in this action was whether the appellant was paid the sum of $974.oo as alleged by the Respondent Company but denied by the appellant

The appellant gave evidence in the Court below and denied that she had been paid the sum of $974.00. She called one 'Witness, her son Pradip Chand, whose evidence on the issue of payment of the $974.00 was quite rightly considered inconclusive by the learned magistrate.

The Respondent Company called four witnesses. One of these witnesses was to officer responsible for keeping the Company's records. The other three witnesses were a Field Manager, Field Officer and Sector Clerk all employed by the Respondent. All four witnesses testified as to the system adopted by the Respondent. Company when paying out cane moneys to growers.

None of the defendants' witnesses could affirmatively state that the Appellate was present at the cane pay on the 24th December 1975 at the Vunimoli Sector Office when the $974.00 is alleged to have been paid to her. Nor could any of them affirmatively state she was paid any money. The defendant relied mainly on documentary evidence admitted by consent. In particular the defendant relied on a cane voucher which shows on it the following particulars:

(1)The·name Jasodra (d/o Mun Deo) (2) the figure of $974 (3) a date, 24th December 1975 and (4) the signatures of the paying officer and witnessing officer (who were two of the witnesses called by the defendant). These witnesses certified on the voucher as follow:

"We certify that the amount in the payment box has been paid to the person(s) we believe is (are) the person (s) shown above.

The voucher contains no acknowledgement by the alleged payee of payment to her of the sum of $974.00.

The learned magistrate after considering all the evidence was in doubt about the alleged nor: payment of the $974.00 He said in his judgment:

"In effect the Plaintiff has said 'I didn't receive the money. 'The burden of proof may then have shifted to the Defendant Company but the defendant company need only adduce in answer such evidence as casts reasonable doubt on the Plaintiffs case. And if it does so, the Plaintiff must fail, the burden of proof being in law on the plaintiff she having pleaded that the Defendant Company 'failed and neglected to pay' and 'the defendant company having pleaded that plaintiff was paid by the defendant'."

The learned magistrate stated that the evidence adduced by the defendant company was, such as to cast a reasonable doubt on the case of the plaintiff that she had not been paid. He gave judgment for the defendant which must be interpreted as dismissal of tile plaintiffs claim. He did not find as a fact that the defendant had paid the plaintiff the $974.00.

The appellant relies on only one of the two grounds of

appeal namely the first ground which is as follow–

> "1 THAT once the Defendant admitted the sum claimed was due, the onus lay on the, Defendant to prove actual payment of the said sum, and the Learned Trial Magistrate erred in Law in not holding accordingly, and further erred in fact in not finding that the Plaintiff was not paid the said sum."

Accepting that the learned magistrate found himself in the position where he could not find either that the defendant had paid the plaintiff the $974.00 or that the plaintiff had not received it the outcome of this appeal must depend on which party earned the legal burden of establishing the issue as to payment.

If that burden fell on the plaintiff in the Court below, as was the magistrate's view, then there is no doubt that the learned magistrate was correct in law in holding in effect that the plaintiff had failed to establish her case.

Cross on Evidence 4th Edition at page 83 when discussing the general rules in the chapter dealing with the burden of proof states the following as regards the evidential burden:

> "According to Taylor, the right test for determining the incidence of the burden of proof is to consider first, which party would succeed if no evidence were given on either side, and secondly, what would be the effect of striking the allegation to be proved out of the record. The onus lies on whichever party would fail if either of these steps was taken."

If this test is applied in the instance case and the plaintiffs negative allegation that the defendant had failed and neglected to pay the $974.00, is struck out and no evidence as to payment was given by either side it is

clear that the defendant would fail. What would be left wou1d be the plaintiffs allegation that the defendant owed her $974.00 for cane supplied to the defendant company which was admitted in the Defense.

So far as the legal burden is concerned *Cross* at page 83 states:

> "Wigmore has truly said There are merely specific rules for specific classes, of case resting for their ultimate basis upon broad reasons of expedience, and fairness"; but this does not often lead to difficulty in ascertaining the party upon whom the burden rests, for a fundamental requirement of any judicial system is that the person who desires the court to take action must prove his case to its satisfaction. This means that as a matter of common sense, the legal burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings:

There is admittedly difficulty in some cases in deciding whether an assertion is essential to a party's case or that of his adversary. In the instant case the learned magistrate has in effect held that the plaintiffs assertion that the defendant company neglected to pay her the money or that she did not receive the money was essential to her case.

In my view having admitted that there was a sum of $974.00 owing to the appellant the burden of establishing payment or satisfaction of this sum rested on the defendant and it was not incumbent on the appellant to establish non payment.

The question of pleading payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration was fully considered in the

Australian case of *Young v. Queensland Trustees Limited* (1956) 99 C.L.R p. 560 where the High Court of Australia headed by Dixon C.J. held that in an action for money lent where the defence of payment to raised, the onus of proving lies upon the defendant

In that action the trial judge entered judgment in favour of the plaintiff as he disbelieved the defendant's evidence as to payment of the several amounts lent From this decision the defendant appealed upon the ground that his uncontradicted testimony as to the repayment of the loans ought to have been accepted and that in any event there was no evidence to disprove payment the burden of disproof lying upon the plaintiff.

That case is of particular interest in the instant case because when the plaintiff opened his case counsel accepted the position that the onus of disproof lying upon the plaintiff. This had been held to be the situation by the Supreme Court of Victoria in *Nelson v, Campbell* (1928) V.L.R 364.

The High Court in its judgment disapproved of *Nelson's* case and said at page 562 "The contention that the burden of disproving payment rests upon the plaintiff is erroneous ..... But the law has always been that it lies' upon a defendant to make out a defence of payment by way of discharge."

The High Court pointed out that in *Nelson's* case the Supreme Court was under a misapprehension in considering that since the cause of action lay in contract non payment must be alleged and proved by the plaintiff as a breach.

The High Court quoted the remarks of Parke B. in *Goodchild v. Pledge* (1836) 1 M & W 363 (150 E.R. 474).

> "I think it will be found, on looking into the cases that the statement of the breach is mere form: if so the plea admits the debt and is a plea in confession and avoidance and it is so treated in the new rules. Under the general issue, as now framed, you deny the existence of a debt at any one time: if you admit the debt you must plead every matter specifically by which you seek to discharge it."

At page 569 the High Court said:

> "The law was and is that, speaking generally, the defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration."

In *Seldon v. Davidson* (1968) 2 All E.R 755 in an action to recover money lent the Court of Appeal upheld a ruling of the trial judge that where receipt of money was admitted by the defendant on the pleadings the burden of proof lay on the defendent who should begin.

In the instant case there were originally two issues. One issue was that the appellant had sold cane to the respondent company and the balance owing to her by the company was the sum of $974.00. She was relieved of establishing this legal burden by the admissions in the Defence which did not deny the sum was at one time owing but raised the further issue that the respondent had satisfied this debt by payment of that sum to the appellant on the 24th December 1975. The legal burden of establishing payment rested on the Respondent on that particular issue.

The proper approach by the learned magistrate should have been to consider whether the respondent on the preponderance of the evidence had establishing that it

had paid the appel1ant the sum of $974.00.lnsteadhe treated the appellant's denial of payment as a legal issue to be established by her and held that the respondents evidence raised doubts and that the appellant had failed to established her case.

At the end of the case the learned magistrate was in the position where he could not decide whether the appellant had received payment or not.

While the appellant alleged non payment this was not an essential part of her case. She could as her counsel Mr Ramrakha has stated have urged on the pleadings that the respondent start and establish that payment was made to her. This was the ruling made in *Seldon's* case which I have already referred to.

Mr Maharaj for the Respondent has quoted a number of cases which would have assisted him if the legal burden of proving non–payment had rested on the appellant. Since I am of the view that the legal burden of proving payment rested on the Respondent the authorities he quoted supported the appellant's case.

Only one such case need be quoted *In Huyton–With–Roby Urban District Council v Hunter* (1955) 2 All E.R p.398 Lord Denning referred to the need to distinguish between legal burden imposed by law and a provisional burden raised by the state of the evidence. He said at page 401–

"At the end of the case of Court has to decide as a matter of fact whether the road is repairable by the inhabitants are large or not. If it can come to a determinate conclusion no question of legal burden arises; but if at the end of the case the evidence is so evenly balanced that the court cannot come to a determinate conclusion the legal burden comes into play and requires the court

to say the local authority have not proved the case."

That is the situation in the instant case. The learned magistrate could not come to a determine conclusion on the issue of payment. He erred in my view in holding that the appellant had to establish the negative averment that she was not paid instead of holding that the onus was on the respondent to prove payment and that it had not discharged that burden.

Since the question of credibility does not arise in this action this court is in as good a position as the magistrate to consider the facts relevant to the issue of payment which are not in dispute.

In the main the respondent relied on documentary evidence that the appellant was paid supported by witnesses who testified as to the system adopted by the company when making cane payments.

The common method of establishing payment is to produce a receipts a simple effective method which should have been but was not adopted in the instant case. Payment can also be established by calling witnesses who testify to the fact that the appellant received payment.

Although four witnesses were called by the respondent not one witness could affirmatively say the appellant was present at theVunimoli Sector Office on the24th December 1975 and was paid the sum of $974.00. The respondent relied on proof of the system of cane payments and its contention that system would make it virtually impossible for the wrong person to be paid the money.

There were five persons present when somebody was paid the $974.00. Two of those persons were bank

officers who were not called to give evidence. Of the other three witnesses one was a Field Manager. He did not testify that he saw the appellant on that occasion or even that he knew her. He relied on identification of payees by the sector clerk. He testified that the names of the growers were called out at a cane pay but he could not remember the particular alleged payment to the appellant. All he could remember about the payment was his signature on the payment voucher.

The Field Officer was new at the time and did not know all the growers. He also relied on the sector clerk for identification of a payee. Of significance was his evidence that there were at the time two Jasodras both an executrix of an estate. The other Jasodra's farm was number 2375–the appellant's farm being number 2235. This witness said the names and farm numbers of the payees were called out and repeated by the clerk but he did not testify that that was done on the day in question. Under cross–examination he stated vouchers were signed by the witnessing officers after all moneys were paid out and not at the time of payment of a payee as the sector manager testified. The sector clerk testified he called the names of the payees and sometimes the farm numbers at cane pays. He knew there were two Jasodras and he would not have let anyone but the plaintiff whom he had known for a long time collect for farm 2235. He did not testify that plaintiff collected the money. He admitted in cross–examination that he had not seen the appellant collect money for some time and he could not say he saw her at the cane pay on 24.12.75.

It is clear from the evidence of these three witnesses that the sector clerk does not always call the name of the grower together with the grower's farm number. It was open to the company to call the other Jasodra to state she had not received the money or any of a number of other growers present at the time to stale the appellant was

present and collected money at that cane pay. They did not do so. Such evidence may have resolved any doubts as to whether the appellant received the money.

The appellant stated categorically that she had not called at the sector office in the past 20 years to collect cane moneys. From 1958 her cane money went to her bank until July 1975 when her crop lien expired. None of the respondent's witnesses other than the sector clerk were asked if they had ever seen her at the sector office and her evidence on this aspect was not shaken.

The Respondent also put in evidence photocopies of the appellant's account. These accounts appear to contradict the cane payment voucher which purports to show that a person believed by the paying and witnessing officers to be Jasodra daughter from Mun Deo was paid $974.00 on the 24th December 1975.

Sheet 12 of the account shows that the sum of $765 was paid out in cash, on 30 November 75 and was returned on 31 December 1975 because the appellant had not collected this sum. The $765 was part of the balance of $974.00.

The sum of $974.00 in the accounts is shown as having been paid in cash on 31 December 1975 and not as stated. No explanation was given for these apparent contracdictions.

The accounts show that on 31August 1975, 31 December 1975, 28 February 1976 and 31 March 1976 sums of money were returned to the Company because the appellant had not collected the money,

On a strict analysis of the evidence the respondent did not conclusively establish that a sum of $974 was paid to the appellant on the 24th December 1974. The procedure

adopted for paying out money was for the Bank to make up cane payments and place the money in envelopes which showed the 'sector number, name and· amount ' on them. These envelopes were prepared in the Banks premises. Bank Officers attended the pay out and handed over the envelopes direct to the payees.

In the instant case no Bank Officer was called to testify that an envelope on which the sum of $974.00was written in fact contained that sum and was handed to a payee. The witnessing officers assumed the envelope contained the sum when evidence could have been adduced to establish this fact.

While, there is no direct evidence on the point it is a fair assumption that a payee is handed a sealed envelope and walks out with it without checking the contents. The witnessing officers certificate was not strictly factual in certifying $974 was, in the instant case paid. All they could truthfully certify to was that an envelope on which an amount of $974.00 was written and which they believed contained that sum was handed over to a payee they believed was Jasodra daughter of Mun Deo. The witnessing officers neither saw nor handled the money they believed to be in the envelope. As a system to establish due payment the system has some short comings which show up; when payment is disputed by a grower as in the instant case. The company is at risk if a mistake is made and the wrong person collects an envelope and a grower can also be at risk if he collects an envelope and finds later that it contains a lesser sum than that noted on the envelope if the Bank contends no mistake was made by it, In the instant case the respondent had to rely on the honesty or accuracy of the Bank's staff to verify payment and the honesty and infallability of sector clerk to identify a payee in a sector where there are 600 growers. If the appellant was telling the truth and there was no finding that she was not the

obvious conclusion is that the system failed on this occasion. The appellant's thumb mark or signature on the cane payment voucher which has ample room for a thumb mark or signature would have resolved any doubts.

Both before and after the 24th December 1975 the evidence indicates the appellant did not present herself at the sector office to collect her money. The defendants case was based on a series of assumptions. It would be a brazen grower who in the presence of five persons and a number of cane farmers who knew him would attend a cane pay collect his money and later contend he had not received his money. It is possible but unlikely that an elderly Indian woman would in such circumstances falsely allege she had not been paid. She complained shortly after the alleged payment to an officer and the manager of the mill that she had not received the money. An investigation at that time by the respondent might have determined whether the appellant was falsely claiming she had not been paid or that a mistake had been made. The respondent chose to rely on its belief that its system was infallible. The appellant also complained to the Police who advised her to see her lawyer.

There is no doubt somebody received the $974.00 but on my consideration of the evidence which is not in dispute there is in my view a reasonable doubt whether the respondent paid this sum to the appellant. Since the legal burden of establishing that the appellant was paid this sum rested on the respondent the respondent failed to discharge its burdent of establishing payment and judgment should have been given to the appellant who has established that that sum was owing to her by the respondent.

The appeal is allowed.

There was no contractual obligation on the respondent to pay interest and the appellants claim to interest is dismissed.

The judgment of the Magistrate Court is set aside and judgment is entered for the plaintiff for the sum of $974.00 with cost of the court below and of this appeal.

Appeal allowed.