

1971

Present : Alles, J., and de Kretser, J.

T. A. J. SENANAYAKE, Appellant, and E. N. P.
SENANAYAKE, Respondent

S. C. 477/67 (F)—D. C. Colombo, 2812S/S

Interrogatories—Action on cheque—Plea of no consideration—Right of defendant to administer interrogatories asking plaintiff what was the consideration—Civil Procedure Code, s. 93—Bills of Exchange Ordinance, s. 27—"Valuable consideration".

Where, in an action on a cheque instituted by the payee against the drawer by way of summary procedure, the defendant has stated in his answer and affidavit that there was no consideration when he issued the cheque, he is entitled to ascertain from the plaintiff by interrogatories what was the consideration for which the cheque was issued, so as to enable him to prepare for the case he has to meet.

APPEAL from a judgment of the District Court, Colombo.

J. W. Subasinghe, for the plaintiff-appellant.

Bala Nadarajah, for the defendant-respondent.

Cur. adv. vult.

August 9, 1971. ALLES, J.—

The plaintiff instituted this action by way of summary procedure for therecovery of the sum of Rs. 7,000 on two cheques dated 1st July, 1965, and 31st July, 1965 (marked P1 and P2), each for Rs. 3,500, delivered to the plaintiff by the defendant and subsequently dishonoured by him. The plaintiff was the wife of the defendant and had sued the defendant for divorce. According to the defendant these two cheques were issued to the plaintiff, prior to the commencement of the trial, as his wife wanted some security for the payment of sums of money which would be decreed against him for the payment of alimony and maintenance. The defendant admits that he signed the cheques and revalidated them subsequently, but he stated in his answer and his affidavit that these cheques were issued for the purpose stated above, that there was no consideration for the amounts stated therein and that the plaintiff was not entitled to present the cheques for payment after they had been dishonoured in December, 1965. He further stated in his affidavit that he had no notice of dishonour that the plaintiff has been paid all sums due on the decree in the divorce case; and that he has a good and valid defence to the plaintiff's claim.

On 13th June, 1967 the defendant filed a motion requesting that the following interrogatories be answered by the plaintiff:—

1. What was the valuable consideration on Cheque P 1 ?
2. What was the valuable consideration on Cheque P 2 ?
3. Was Cheque P 1 dated 1st July delivered to the plaintiff on 1st July, 1965 ?
4. Was Cheque P 2 dated 31st July delivered to the plaintiff on 31st July ?
5. Was Cheque P 1 delivered to the plaintiff in the precincts of the District Court prior to the commencement of the trial in District Court of Colombo case No. 6565/D ?
6. Was Cheque P 2 delivered to the plaintiff in the precincts of the District Court prior to the commencement of the trial in District Court of Colombo case No. 6565/D ?

Mr. Subasinghe for the plaintiff-appellant does not dispute that his client was obliged to answer Interrogatories 3 to 6, since they relate to questions of fact, but he submits that he is entitled under Section 98 of the Civil Procedure Code, to refuse to answer interrogatories 1 and 2 since they constitute questions of mixed law and fact. It was his further submission that the defendant should be aware why he issued these two cheques and suggests that this is an attempt to shift the burden of proof to his client when the burden lay on the defendant. In support he relied on the decision of the Madras High Court in *Mariappan v. Nalla Sevugan Servai*¹ where the Court held that, in a suit on a promissory note where the defendant pleaded want of consideration, the onus lay entirely on the defendant and he cannot escape the onus by laying no evidentiary basis for his defence but by seeking to get an admission from the plaintiff by interrogatories. In that case it was held that the party on whom the onus of proof rested did not attempt in the smallest possible degree to attempt to discharge the onus. The Court therefore held that it was a subtle attempt to shift the onus of proof. In the present case the facts are different. The defendant has pleaded that there was no consideration for the cheques and supported his plea with affidavit evidence as to the circumstances in which he delivered the cheques to his wife. In framing the interrogatories in the form he did, he was not shifting the burden of proof, but only endeavouring to ascertain from the plaintiff what, in her submission, was the consideration for which the cheques were issued, so as to enable him to prepare for the case he had to meet.—Vide *Hailsham (Simonds Ed.)* Vol. 12 Para 87.

Although there is a presumption in respect of bills of exchange and cheques in regard to valuable consideration, it is not conclusive proof but only a rebuttable presumption. Therefore, when the drawer denies

¹ (1933) A. I. R. Madras 298.

that there was any consideration. he can only rebut the presumption if he knows what the other party alleges is the valuable consideration. The defendant in such a case can show that there was no consideration whatsoever or explain the circumstances how the valuable consideration came to be constituted and may be entitled to take certain defences under the law. Merely making a bald statement that there was valuable consideration is insufficient, as the defendant may be unable to meet the allegation that has been made or to test whether the consideration alleged is valuable consideration recognised by law or to ascertain whether it is sufficient consideration. Section 27 of the Bills of Exchange Ordinance defines "valuable consideration" as—

- (a) any consideration which by the law of England is sufficient to support a simple contract;
- (b) an antecedent debt or liability. Such a debt or liability is deemed to be valuable consideration whether the bill is payable on demand or at a future time.

The defendant is therefore entitled to know under which limb of the Section the plaintiff seeks to claim the payment as valuable consideration so that he may endeavour to disprove it. He can even maintain that it was an illegal consideration in which case no burden shifts to him. In the present case the plaintiff was aware of the defendant's position as to why he dishonoured the cheques. If her position was that there was valuable consideration for the cheques there should be no difficulty why she should not state what that consideration was.

Reference has been made in the course of the argument to the general observation of A. L. Smith, J. in the leading case of *Kennedy v. Dodson*¹ where the following observation appears :—

"In my opinion the legitimate use and the only legitimate use of interrogatories is to obtain from the party interrogated admissions of fact which it is necessary for the party interrogating to prove in order to establish his case."

but as Nagalingam S. P. J. remarked in *Chatoor v. General Assurance Society Ltd.*², the language used by Smith J. was not intended to have such a general import and the learned Judge in that judgment has referred to several English cases which illustrate that a proper function which interrogatories can and do perform is to enable the party interrogating to ascertain what the case he has to meet and what really are the matters at issue.

For the above reasons I hold that the defendant was entitled to administer the Interrogatories 1 and 2 and I would dismiss this appeal with costs.

¹ (1895) 1 Ch. 334 at 341.

² (1954) 56 N. L. R. 566 at 570.

DE KRETZER, J.—

The facts are set out in the judgment of my brother Alles, J. In my view once the defendant had set out in his affidavit filed for the purpose of obtaining leave to appear and defend the facts which he relied on to show there was no consideration when he issued the cheques sued on he was entitled before the trial to ask the plaintiff "Please tell me what you say is the good and valuable consideration for which you say I issued the cheques".

The answer to that query would enable him to get ready to meet that position and would prevent him from being taken by surprise and being prejudiced at the trial. That is one of the objects for which an interrogatory can be legitimately issued—Vide the case of *Chatoor v. General Assurance Society Ltd.*¹

It appears to me that the learned District Judge was right in ordering plaintiff to answer the interrogatories 1 and 2 by which the defendant sought to ascertain what was the valuable consideration for which the cheques sued on were issued.

Counsel for the plaintiff did not at his appeal canvass the correctness of the District Judge's order in respect of interrogatories 3, 4, 5 and 6.

I agree with my brother's order that the appeal should be dismissed with costs.

Appeal dismissed.

