

OSADA CARR, PLAINTIFF AND APPELLEE, VS. THE HONGKONG & SHANGHAI BANKING CORPORATION, DEFENDANT AND APPELLANT.

G.R. No. 10476. November 20, 1915

Ponente: JOHNSON, J.

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JOHNSON, J.:

This action was commenced in the Court of First Instance of the city of Manila on the 22d of June, 1914. Its purpose was to recover of the defendant the sum of P1,035, with interest and costs.

After hearing the evidence adduced during the trial of the cause, the honorable George R. Harvey, judge, rendered a judgment in favor of the plaintiff and against the defendant for the sum of P1,035, with interest at the rate of 6 per cent per annum, from the 23d of June, 1914, and costs.

The lower court denied the remedy prayed for in the cross complaint of the defendant. From that judgment the defendant appealed to this court and made several assignments of error.

From an examination of the record brought to this court, the following facts are established and are not disputed:

First. That on the 7th of September, 1908, the plaintiff herein and her husband, Edward Carr, deposited with the defendant the sum of P1,000, and in receipt therefor took a "deposit receipt" in the words and figures following:

"C. 3-1/2 per cent p. a.

"DEPOSIT RECEIPT.

"P1,000 Philippine Currency.

"Due, 7th September, 1909.

"HONGKONG & SHANGHAI BANKING CORPORATION.

"No. 44/363.

"MANILA, 7th September, 1908.

"RECEIVED from Mr. Edward Carr & or Mrs. Cid Carr pesos ONE THOUSAND only Philippine currency, to be placed on deposit for 12 months bearing interest at the rate of 3-1/2 per cent per annum, repayable here on production of this receipt.

"HONGKONG & SHANGHAI BANKING CORPORATION.

"(Sgd.) H. M. MORRIS, accountant.

"(Sgd.) J. KENNEDY, manager.

"Interest on this receipt will cease at due date unless renewed.

"NOT TRANSFERABLE."

Second. That the plaintiff here and the said Edward Carr, mentioned as the other payee in said "deposit receipt," are husband and wife.

Third. That said "deposit receipt" above quoted in paragraph 1 remained in the possession of the plaintiff herein from the time of its issuance up to the time of the commencement of the present action.

Fourth. That on or about the 3d of July, 1913, the said Edward Carr mentioned in said "deposit receipt," above-quoted, appeared at the bank of the defendant and demanded the payment of said "deposit receipt," together with interest thereon from the 7th of September, 1908, up to July, 1913.

At the time of the demand Edward Carr did not present said "deposit receipt." He stated to the defendant that said receipt had been lost. For some reason or other, which is not fully explained, the defendant, on the said 3d of July, 1913, issued to the said Edward Carr another "deposit receipt," marked Exhibit 2, in the words and figures following:

"DEPOSIT RECEIPT.

"P1158.75 Philippine Currency.

"Due 3, July, 1914.

"HONGKONG & SHANGHAI BANKING CORPORATION.

No. 49/269.

"MANILA, 3 July, 1913.

"RECEIVED from Mr. Edward Carr, pesos one thousand one hundred and fifty-eight, cents seventy-five—to be placed on deposit for 12 months, bearing interest at the rate of 3-1/2% per annum, repayable here on production of this receipt.

"HONGKONG & SHANGHAI BANKING CORPORATION.

(Sgd.) "H. BATES, accountant.

(Sgd.) "J. KENNEDY, manager.

"Interest on this receipt will cease at due date unless renewed.

"NOT TRANSFERABLE."

The signatures at the bottom of this second "deposit receipt" seem to have been erased. The signatures are the signatures of the accountant and manager of the defendant. The erasures are not explained. On the reverse side of this last "deposit receipt," there appears the following indorsement, signed by initials:

"This receipt is a renewal of our fixed deposit receipt No. 44/363, in favor of Mr. Edward Carr & or Mrs. Cid. Carr, for P1,000."

The initials at the foot of said indorsement are not sufficiently plain to indicate by whom they were made. There is also a further writing upon the back of said second "deposit receipt," as follows:

"EDWARD CARR,

"SEDIO WOOLEY.

"State of Washington,

"U. S. A."

Fifth. The amount of the second "deposit receipt" marked Exhibit 2, above quoted, was paid by the defendant to the said Edward Carr, in full, on the 11th of November, 1913.

Sixth. That evidently in order to secure said Exhibit 2 on the 3d of July, 1913, and later the payment in full thereof from the defendant, the said Edward Carr, on the 2d of July, 1913, executed and delivered to the defendant a promise of indemnity in the words and figures following, marked Exhibit 1:

"MANILA, 2 July, 1913.

"TO THE MANAGER, HONGKONG & SHANGHAI BANKING CORPORATION.

"SIR: I, the undersigned, Edward Carr, beg to inform you that I have mislaid or lost deposit receipt or instrument hereunder.

"In consideration of your agreeing to pay to me the principal sum of pesos one thousand, only, mentioned in the said deposit receipt or instrument with interest thereon for the period of four years from the 7th day of September, 1908, without my surrendering to you the said deposit receipt or instrument, I do hereby for myself, my executors and administrators agree to indemnify and hold you harmless against all claims which have already arisen or which may hereafter arise and all losses and damages which have arisen or which may be hereafter incurred by you in the event of the said principal sum and interest payable under the said deposit receipt or instrument being again paid by you or by any of your branches or agencies to any person or persons whomsoever.

"I am, sir,

"Your obedient servant, (Sgd.) EDWARD CARR.

"We, the undersigned on behalf of ourselves individually and on behalf of all our partners in our respective firms, hereby, in consideration of your paying to the above named Edward Carr * * * the principal and interest mentioned in the undermentioned instruments, agree to guarantee, indemnify and hold you harmless against all losses and damages which you may incur in the event of the said principal moneys and interest under the above instrument being paid by you or by any of your branches or agencies to any person or persons whomsoever.

"DESCRIPTION OF INSTRUMENT.

"Fixed 'deposit receipt No. 44/363' dated September 7, 1908, in favor of Mr. Edward Carr & or Mrs. Cid. Carr, P1,000."

From the judgment of the lower court deciding that the defendant was liable to the plaintiff for the full amount of said deposit receipt No. 44/363 the defendant appealed to this court.

Very interesting and instructive briefs are presented by both the appellant and appellee. The defendant-appellant presented a demurrer in the court below to the complaint, alleging that the same did not show facts sufficient to constitute a cause of action. The court overruled the demurrer, to which exception was duly taken. The defendant then answered the complaint.

The defendant contends that its demurrer should have been sustained. It argues that inasmuch as the document set out in the complaint upon which the action is based (deposit receipt) showed upon its face that it was payable to one person or to another person, that it was the duty of one or the other, in bringing an action upon said document, to allege or rather to negative the fact that the same had not been paid to the other. Generally speaking, payment is a defense. An allegation that a contract has been executed and delivered and not paid, generally speaking, constitutes a cause of action. There may be cases where contracts are payable in the alternative, to one or to

another person, in which it might be necessary to negative the fact that it had not been paid to either one or the other, in case an action is brought by one alone. In the present case, however, in view of the condition of the contract, to wit: that it is "payable on the production of this receipt" (deposit receipt), and the plaintiff in the present action having produced the receipt, there is at least a presumption that the same had not been paid to the other person. The plaintiff having produced the receipt was justified in alleging simply that it had not been paid, without the necessity of alleging or negating the fact that it had not been paid to the other person mentioned in said contract. We are of the opinion, in view of the express terms of the contract sued upon, that the lower court committed no error in overruling the demurrer.

With reference to the other assignments of error it may be said that they together present the question whether or not, in view of the facts in the present case, the plaintiff was entitled to recover upon the deposit receipt in question, in view of the fact that the defendant had already paid a sum equal to said receipt to one of the persons mentioned therein.

No analogous cases are cited by the appellant, or appellee. They are each of the opinion that no analogous cases exist. It will be remembered that Edward Carr, when he demanded payment upon said deposit receipt, informed the bank that the same had been lost or mislaid. There are many cases in the books where negotiable or nonnegotiable instruments have been lost and where actions have been brought against the payors, notwithstanding that fact. (*Citizens' National Bank vs. Brown*, 45 Ohio St., 39; 4 Am. St. Rep., 526 and cases cited.)

In most cases the payee, in case of an action on a lost instrument, has been obliged to indemnify the payor against loss. The indemnity however has only been required when by some possibility the payor might be obliged to pay the amount due on such instrument to other legitimate holders. If the instrument was payable to order and had been lost before indorsement, or if it was a nonnegotiable instrument, then in such cases, the courts have relieved the payee from the necessity of giving indemnity. (*Citizens' National Bank vs. Brown*, *supra*, and cases cited.) In the present case the defendant paid the amount due to one of the alternative payees, without demanding a return of the deposit receipt, upon the execution and delivery by one of the alternative payees of an indemnity contract. Thus the defendant, by virtue of the requirements of said indemnity contract, admitted that, by the payment to one of the alternative payees without a return of the deposit receipt it was not relieved by such payment from all responsibility in the premises.

We are of the opinion, in view of the fact that the deposit receipt contained the provision that it was payable only upon its production, that the defendant did not relieve itself by paying to one of the alternative payees the amount due on said receipt, without its production. Upon the other hand, if Edward Carr had presented the deposit receipt and had demanded payment thereon, we are of the opinion and so hold that the bank would have been thereby relieved from any and all responsibility to the other alternative payee. The bank, by the very terms of the deposit receipt, had a right to pay either one or the other of the alternative payees "on the production of this receipt"; but it was not relieved by paying one of the alternative payees, without the production of the receipt, without the consent of the other payee. Either of such alternative payees had a right to demand payment of said deposit receipt upon the production of the same. The bank contracted to pay to either one upon the production of said receipt. The parties themselves agreed that it might be paid to one or the other upon its production. The deposit receipt was not produced by Edward Carr. He did not present it at the time the bank paid him. It was presented by the present plaintiff, and under the very terms of the contract which the bank had made with her, she had a right to demand its payment. The fact that the bank had paid the other alternative payee, without the production of the deposit receipt, does not relieve it from liability on said instrument.

In view of all of the foregoing, we are of the opinion and so hold that the judgment of the lower court should be

and is hereby affirmed, with costs. So ordered.

Arellano, C. J., Torres, Carson, and Araullo, JJ., concur.

CONCURRING OPINION

TRENT, J.:

Understanding as I do that there was no proof of connivance between the plaintiff and her husband at the time the bank paid the latter an amount equal to that deposited, I concur in the result.

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