1963

Josephine H. Christensen v. Financial Service Co., Inc. : Appellant's Petition for Rehearing

Utah Supreme Court

Lorin J. Broadbent; Attorney for Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

JOSEPHINE H. CHRISTENSEN, as guardian ad litem for and in behalf of JOSEPH CHRISTENSEN, aka JOSEPH NORMAN CHRISTENSEN,

Plaintiff and Respondent,

vs.

FINANCIAL SERVICE CO., INC.,

Defendant and Appellant.

Case No. ~~9694~~ 9649

Appellant's Petition for Rehearing

Appeal from the Judgment of the First Judicial District Court for the County of Cache, Honorable Lewis Jones

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JOSEPHINE H. CHRISTENSEN, as guardian ad litem for and in behalf of JOSEPH CHRISTENSEN, aka JOSEPH NORMAN CHRISTENSEN,
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vs.

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Defendant and Appellant.

Case No. 9694

Appellant's Petition for Rehearing

Defendant and Appellant seeks rehearing and reconsideration of this Court's holding in its decision filed January 25, 1963, that the plaintiff and respondent, Joseph Christensen, the payee of the note in suit is a holder in due course. If the Court on reconsideration and rehearing determines that said plaintiff is not a holder in due course, the defendant and respondent seeks the Court's determination on the merits, (1)

whether the evidence supports the trial Court's findings that there was sufficient and lawful consideration as between the defendant and Norman Christensen who induced the note, (2) a determination that the defendant is entitled to any setoffs it may have proved as against Norman Christensen, and (3) a determination that such setoffs and/or failure of consideration exceed the amount of the plaintiff's claim and that the defendant is, therefore, entitled to judgment.

STATEMENT OF FACTS

In addition to the Statement of Facts contained in the defendant's original brief herein, or more properly by way of clarification of that statement of facts, the following:

The plaintiff Joseph Christensen did not give value either to the defendant Financial Service Company, Inc., or his father, Norman Christensen, and is a mere donee of the note in suit.

ARGUMENT

POINT I

THIS COURT'S DECISION FILED HEREIN ON JANUARY 25, 1963, IS IN ERROR IN HOLDING THAT THE PLAINTIFF AND RESPONDENT, JOSEPH

CHRISTENSEN IS A HOLDER IN DUE COURSE.

A. THE RECORD BELOW CLEARLY INDICATES THAT JOSEPH CHRISTENSEN, THE PAYEE OF THE NOTE IN SUIT, DID NOT GIVE VALUE TO ANYONE FOR THE NOTE BUT IS A MERE DONEE.

The Court has stated in its opinion on page 3:

> "Defendants avermant that Joseph did not give value for the note appears to result from a misapprehension. Its evidence was calculated to show that he did not give value to the defendant corporation. It is not essential that he did so. But no evidence was adduced to show that Joseph did not give value to his father, Norman Christensen."

At the outset of the trial, the plaintiff, consistent with his complaint, proceeded merely to produce the note in suit and the proper signatures of the defendant's officers, thus relying on the statutory presumption of consideration. As the Court correctly indicates, the defendant then proceeded with evidence showing that the defendant received nothing of value from the plaintiff, Joseph Christensen, in exchange for the note. (TR. 5.) Thereupon, the plaintiff proceeded to produce evidence tending to show that the consideration for the issuance of the note in suit was the cancellation of alleged antecedent indebtedness of the defendant to Norman Christensen. (TR. 6.) After some discussion

and testimony introduced by both sides, the plaintiff objected to any further questions by the defendant with regard to the defendant's relationship to Norman Christensen in connection with the alleged debt. At page 28 of the Transcript the following appears:

> "MR. BROADBENT: You are alleging that the consideration for this alleged note came from Mr. Christensen [Norman].
>
> "MR. PRESTON: That's right."

Following an adjournment of the trial of the case on August 25, 1961, and before the testimony was completed, the plaintiff submitted a brief to the court and mailed a copy to the defendant's attorney on the 5th day of September, 1961. On the first page of said brief which is a part of the record herein, the plaintiff states:

> "The plaintiff brings this action as the holder of a promissory note in his favor for which he gave no consideration for (sic) personally . . ."

After the case was concluded the defendant submitted its brief (PL. 49 et seq.). Defendant's brief stated on pages 2 and 3:

> "The further *uncontroverted evidence of the defendant, and the express admission on page one of the plaintiff's brief herein,* established beyond question that the plaintiff, Joseph Christensen, the alleged payee of the note, neither took delivery from any of defendant's authorized agents *nor himself gave consideration.*" (Emphasis supplied.)

This language was quoted and referred to subse-

quently in the plaintiff's reply brief. It was challenged only with regard to the question of delivery, as follows:

> "It is impossible to claim lack of delivery, unless they claim that either Joseph or his father stole the note. Thus, they had to have the note in their hands in order to sign the same; so that the first quotation is merely a misstatement of the facts and of the contents of our previous brief."

This reply brief of the plaintiff, part of the record herein, and before the trial court, further states at page 2:

> "Mr. and Mrs. Christensen have been divorced with the tie between them being their only child, Joseph. One of the most natural instincts in human kind as well as in wild animals is the protection of offspring. The *completion of an education of Joseph* so that he might be self-supporting in an honorable manner *was the urge that gave rise to the note sued upon . . .*" (Emphasis added.)

The trial court's finding that the plaintiff is a holder in due course was not based upon a finding of the fact, or the lack of evidence to the contrary, that Joseph gave value to his father or anyone else. At page 432 of the Transcript, the court states:

> "In the case of Joseph Christensen vs. Financial Service Company, the court finds as a fact that there was *at least some consideration which ostensibly passed from Norman Christensen to the Financial Service Company.* I'm not finding full consideration; just some. And *to that extent I find that Joseph is entitled to be clothed with*

> *some of the robes of a holder* and I direct judgment in his favor against Financial Service Co." (Emphasis added.)

This view of the evidence is also reflected in the Court's formal Findings of Fact and Conclusions of Law, Finding of Fact No. 7 (PL 111) as follows:

> "That the note was given by the defendant to the plaintiff in return for cancellation of indebtedness owed by the defendant corporation to one Norman Christensen, the father of the defendant. . . ."

Finally, at page 3 of the plaintiff's and respondent's brief before this Court it is again expressly admitted that:

> "The record in this case shows that respondent did not, from his own pocket give any consideration for the note."

In view of all of the foregoing, it is submitted that the record is abundantly clear that Joseph Christensen was a mere donee of the note in suit. To hold otherwise is to vitiate the entire theory on which the case was tried by both of the parties and to require further evidence of facts not in issue between the parties. The presumption indulged by this Court that a payee is presumed to be a holder in due course is at best questionable under the law, as will appear hereafter. If such a presumption exists in the law, it has been dissipated in this case by evidence and the express oral and written statements by plaintiff's counsel before the trial court.

B. THE COURT IS IN ERROR IN HOLDING THAT THE PAYEE HERE IS PRESUMED TO BE OR IS A HOLDER IN DUE COURSE IN THE ABSENCE OF PROOF THAT HE GAVE VALUE.

It is conceded that there is a division in the authorities as to whether a payee can ever be a holder in due course. It is conceded also that better view is probably that a payee may be a holder in due course if he otherwise qualifies. Defendant's initial brief herein and the authorities cited are not for the purpose of urging upon this Court a contrary view. However, it does not follow from the proposition that a payee may be a holder in due course that he is presumed to be such. 36 Yale L. J. 608, Aigler, "Payees as Holders in Due Course," relied upon by the Court argues expressly to the contrary. After a careful section by section analysis of the negotiable instruments act and the cases under the act and under the common law preceding it, Professor Aigler at pages 630-631 concludes:

> "Since by the statute payees are holders, and holders are presumptively holders in due course, is it to be said that every payee is prima facie a holder in due course? It is conceivable that such should be the result. But, reading the statute in the light of the common law and remembering that in a large percentage of transactions the instrument in its inception comes to the payee as a promisee and not as a purchaser, would it not more reasonably be concluded that a payee is not entitled to the presumption unless it appears that he took *by purchase?*"

> "After all, whether a payee is a holder in due course is a question not susceptible of a categorical answer. In each instance the conclusion should depend upon the type of situation presented. *No doubt, prima facie, a payee is not a holder in due course because presumptively he took the instrument as* promisee *rather than* purchaser. But, it always should be open to proof that he really acquired the paper in the latter capacity, in which event his status may be that of a due course holder." (Emphasis added.)

It is submitted that even where the maker of an instrument fails to show by affirmative evidence that the payee did not give value to some other person, the payee is not automatically a holder in due course. In *Seaboard Finance Co. v. Miles & Sons, Inc.,* 102 C.A.2d 526, 277 P.2d 892 (1951), the defendant drew and made a check for the convenience of its subcontractor, Davies, which check was made payable to the plaintiff. The court held that the presumtion of consideration was sufficiently rebutted by evidence that the *drawer was not indebted to the payee,* nor obligated to the subcontractor to make the payments directly for his convenience and had not guaranteed the subcontractors obligation to the plaintiff. The court said 227P2d, at 893.

> ". . . and plaintiff, knowing nothing of anything which transpired between defendant and Davies [subcontractor] had no reason to expect that defendant would make payments due it from Davies. It is not contended that defendant owed anything to plaintiff, *nor was it shown that plaintiff suffered any loss or detriment by reason of the stoppage of payment on the check."* (Emphasis supplied.)

In other words, the plaintiff-payee was held not to be a holder in due course since there was *no evidence* that it had given value in the form of some loss or detriment. And all the defendant was required to do was to rebut the presumption of consideration between the maker and payee.

Another case in which the plaintiff was the payee of a note induced by a third party is *Atkinson vs. Inglewood State Bank,* 141 Colo. 436, 348 Pac.2d. 702 (1960). That case holds by implication that the amount of evidence necessary to rebut the alleged presumption that the holder of a note is a holder in due course is that amount of evidence which would raise a jury question. The court stated: 348 Pac.2d at 705:

> "We conclude that there was sufficient evidence of fraud as an inducement to the execution of the instrument here so that the question whether plaintiff was a holder in due course was at issue. Defendant having proved at least a prima facie defense, the burden was on the plaintiff to establish by a preponderance of the evidence that it was a holder in due course.
>
> ". . . .
>
> "We agree with the defendant's contention that the value requirement of Sec. 52(3) was not satisfied. It is undisputed that following receipt of the note from Palmer [who induced its execution], plaintiff credited his account in the amount of $823.80. *There is not the least suggestion, however, that Palmer was allowed to draw checks against the credit thus extended.*" (Emphasis added.)

Thus, where the maker established merely a prima facie defense as against the *person inducing the instrument,* the *payee* was put upon his proof to demonstrate that he fulfilled all of the requirements of a holder in due course. It is submitted in the instant case that the defendant produced a prima facie defense to the note in question not only with regard to absence of consideration but also at least partial illegality of consideration as well as fraud. That the trial court found no fraud is not to say that such would not have been a jury question or that there was not a prima facie defense, shifting the burden to the one claiming to be a holder in due course.

The issue of illegality of the purported consideration between Norman Christensen and the defendant was certainly raised before the trial court and was urged upon this Court in defendant's original brief. Specifically, the defendant has contended that part of the alleged consideration for the note in suite is a claim for the payment of illegal dividends, (1) not out of surplus, (2) while the defendant corporation was insolvent, (3) not formally authorized, and, (4) *on fictitious corporate indebtedness contrary to the Utah Constitution.* This vital issue has been passed over by both the trial court and this honorable Court.

CONCLUSION

In one of the opening paragraphs of his article, "Payees as Holders in Due Course," supra, Professor Aigler observes, "Only infrequently have Courts given

any attention to the background of the problem; they have been disposed to seize upon certain language in the Act, some of it pointing to one conclusion and some in the opposite, or to be content with the adoption of one of the two views expressed in two or three conspicuous cases decided under the Statute. . . ."

It is respectfully contended that it has been expressly and impliedly admitted throughout the record that the plaintiff in this case did not himself give value for the note in suit to anyone. However, even if such is not the case, the Negotiable Instruments Act does not raise a presumption that a payee is a holder in due course. It merely permits him to demonstrate that he is.

It is respectfully suggested that the Court's decision contains within it hasty extensions of that doctrine, which confuse rather than clarify the law. The Court has before it the opportunity upon reconsideration and rehearing of this matter to reconcile some of the confusion that has heretofore existed.

To deny the respondent the gift contemplated by his father is not to deny him the right properly to present his father's claim against the appellant. A donee is not a holder in due course. *Tilley v. Price* (Okla. 1954), 267 P.2d 996.

Respectfully submitted,

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