

1955

Present : Gratiaen, J., and Swan, J.

MERCANTILE BANK OF INDIA LTD., Appellant, and V. S. RATNAM,
Respondent

S. C. 366—D. C. Colombo, 25, 215

Cheque—Crossed generally—Theft of cheque—Payment by drawee otherwise than to a banker—Drawee's liability to drawer—Bills of Exchange Ordinance, ss. 3 (3), 79 (2).

Where a cheque crossed generally by the drawer is paid by the drawee otherwise than to a banker, the drawee's liability to the drawer is not automatic; it arises only if, by reason of the unauthorised mode of payment, the drawer proves that he has incurred a loss for which responsibility may fairly be imputed to the drawee. Therefore, where such a cheque is stolen after the payee indorses it in blank and is subsequently paid across the counter to a holder, the drawer cannot avail himself of the provisions of section 79 (2) of the Bills of Exchange Ordinance to institute action for a declaration that the drawee is not entitled to debit his account with the amount of the cheque.

APPPEAL from a judgment of the District Court, Colombo.

G. E. Chitty, with *J. de Saram*, for the defendant appellant.

N. K. Choksy, Q.C., with *D. J. Tampoe* and *K. M. U. Jayanetti*, for the plaintiff respondent.

Cur. adv. vult.

November 17, 1955. GRATIAEN, J.—

According to the facts as found by the learned trial Judge, the plaintiff had borrowed Rs. 2,000 from Dr. Thurairajah (hereafter called "the payee") on the security of his cheque dated 1st December 1950 drawn on the defendant Bank in favour of the payee "or order". At the time of its delivery to the payee, the cheque had been crossed generally. The arrangement was that the cheque should be presented for payment on a future date to be agreed upon, and in the meantime the payee was to be paid Rs. 13.33 each month by way of interest on the loan. Six months later (i.e., on 1st June 1951) the plaintiff was in a position to repay the loan but, as the cheque in its original form might be rejected as "stale", the plaintiff, at the payee's request, altered the date "1.12.50." to "1.6.51." and placed his signature below the alteration. The payee then took back the cheque and shortly afterwards, having indorsed it in blank, gave it to someone to be sent by post to the Bank of Ceylon for collection.

Unfortunately, the payee had not taken the precaution of indorsing the cheque specially in favour of the Bank of Ceylon or even of making it "not negotiable".

On or about 11th June 1951 the payee began to feel uneasy because the Bank of Ceylon had not acknowledged receipt of the cheque. He then learnt that his letter, with the cheque enclosed, had not reached them. The plaintiff was informed, and he visited the defendant Bank where he discovered that the amount of the cheque had been paid across the counter on 4th June 1951 to a subsequent indorser signing himself as "W. D. Fernando". The cheque, at the time when it was presented for payment, bore words cancelling the original crossing and also purporting to contain, immediately beneath those words, the plaintiff's signature.

The plaintiff has repudiated the signature purporting to authorise the cancellation of the crossing, and his evidence on the point has been accepted by the learned Judge. I would therefore hesitate to take a different view, but the resemblance of the impugned signature to his admitted signatures is so remarkable that (as the learned Judge himself remarked) the officers of the Bank could not be blamed for acting upon the purported cancellation.

The payee's honesty was not challenged at the trial, so that (upon the trial Judge's findings of fact) the inference is irresistible that somebody had dishonestly intercepted the letter containing the cheque either before or after it was sent by post to the Bank of Ceylon. The details of what occurred thereafter have not been investigated, and there is no evidence on record from which we can determine whether "W. D. Fernando" whose indorsement appears below that of the payee participated in the fraud. He may have been the thief, or he may have been an innocent person with whom the thief negotiated the stolen cheque for valuable consideration. Speculation on these intriguing questions is unprofitable and unnecessary for the purpose of our decision.

The plaintiff and the payee were uncertain as to which of them should claim the value of the stolen cheque from the defendant Bank. At first the payee sent the Bank a letter of demand, but ultimately it was decided that the plaintiff should institute this action on his own account for a declaration that the Bank was not entitled to debit his account with the sum of Rs. 2,000 representing the payment made across the counter on 4th June 1951.

The learned Judge entered a decree in favour of the plaintiff on the ground that, by reason of the Bank having paid the crossed cheques otherwise than to a Banker, the plaintiff's original debt to the payee was revived by operation of law. The Bank was therefore held liable to indemnify the plaintiff for the loss resulting to him from its disobedience of his mandate as to the mode of payment.

It may be assumed for the purposes of this appeal that, when the cheque was presented for payment by "W. D. Fernando" on 4th June 1951, the Bank realised (or should have realised) that it was still crossed generally and ought not to have been paid across the counter. The question is—what legal consequences flow from this unauthorised mode of payment?

Section 79 (2) of the Bills of Exchange Ordinance expressly provides that, where a cheque crossed generally has been paid by the drawee "otherwise than to a Banker", he is liable to the "true owner" for "any loss he may sustain owing to the cheque having been so paid". The proviso to the section introduces a statutory exemption from liability which has no bearing on the present case. Indeed, section 79 (2) admittedly does not apply to the plaintiff. It was the payee who became the "true owner" of the cheque when he took delivery of it on 1st June 1951; and, for reasons which I shall later explain, the payee had himself been divested of ownership before the cheque was paid across the counter to "W. D. Fernando".

In what circumstances then, can the drawer of a cheque which was generally crossed refuse to let the drawee debit his account if the cheque was paid across the counter? The Ordinance does not prohibit this mode of payment in express terms, nor does it provide the drawer himself (as opposed to the "true owner") with a statutory remedy in such a situation. Nevertheless, under the common law of England which applies to Ceylon in cases of this kind, the general crossing of a cheque operates as a mandate to the drawee to make the payment to a banker *and to no one else*; accordingly, a drawee who makes a payment across the counter in disobedience of the mandate acts at his peril. His liability to the drawer in such an event is not, however, automatic: it arises only if, by reason of the unauthorised mode of payment, the drawer proves that he has incurred a loss for which responsibility may fairly be imputed to the drawee.

In *Bobbett v. Pinkett*¹, Bramwell J. has given an example of a situation in which the drawer of a crossed cheque can, if so minded, repudiate a payment made by the drawee in an unauthorised manner. In that case a specially crossed cheque was stolen from the payee *before he had indorsed it*, and the drawee ultimately paid the cheque upon a forged indorsement to a banker other than that named in the crossing. It was held *inter alia* that the drawer could have objected to his account being debited with the amount of the cheque. The reason is quite clear. The payee had not parted with his title to the cheque at the time it was stolen, and the forged indorsement could not operate to pass title to a subsequent holder (however innocent). In that state of things, the drawer's original debt to the payee was revived because the payee had relied on the protection of the special crossing when he "accepted the cheque as discharge of the debt". *Grant's Laws of Banking* (Edn. 5th) p. 214. Accordingly the drawer's loss, resulting from the revival of the earlier debt, was directly referable to the drawee's failure to obey the mandate contained in the crossed cheque.

A different situation was incidentally discussed in *Smith v. The Union Bank of London*². *If, notwithstanding the unauthorised mode of payment, the money is in fact paid to the lawful holder of a crossed cheque* no action lies against the drawee. In other words, it is an essential element of the drawer's cause of action that he had sustained a loss directly resulting from the unauthorised mode of payment. Provided that the money

¹ (1876) 1 Ex. D. 369.

² (1875) 10 Q.B. 291.

reaches the hands of the true holder of the cheque, the actual mode of payment is irrelevant. The Court of Appeal affirmed the judgment of Blackburn J. in *Smith's case*¹.

The principle that an unauthorised mode of payment of a crossed cheque does not automatically attach liability to the disobedient banker seems to be tacitly recognised in *Baines v. The National Provincial Bank*². A bookmaker had there delivered a crossed cheque for £200 to a customer shortly before 3 p.m., on 14th August 1925. The customer arrived in great haste on the same day at the office of the Bank on whom the cheque was drawn and persuaded them to pay the money to him across the counter (instead of through a collecting Bank) a few minutes after their normal closing hour. On the next morning the bookmaker sent a message to the Bank stopping payment of the cheque, but was told that the instructions had arrived too late. The bookmaker unsuccessfully repudiated the payment on the ground that the payment had been made shortly after closing time. It was not suggested that objection could be taken to the payment across the counter in disobedience to the mandate, because the true purpose of a mandate contained in a crossed cheque is to prevent the money reaching the hands of some person other than "the true holder".

It is in the light of these principles that the plaintiff's claim against the defendant Bank must be examined. He did not allege in his plaint that any loss had resulted to him from the payment of the crossed cheque across the counter, nor was an issue raised at the trial as to whether such loss had in fact occurred. For this reason alone, the learned Judge should have upheld the objection that the plaint disclosed no cause of action against the Bank. The learned Judge took the view, however, that the plaintiff's liability to the payee on the original debt was revived when the cheque, having been stolen in transit, fell into the wrong hands. Mr. Chitty contended, on the other hand, that in this particular case the cheque had been accepted in complete satisfaction and not as conditional payment, of the earlier debt. There is much to support Mr. Chitty's argument, but in my opinion, even upon the theory of a conditional payment, the debt did not revive. Let me explain why.

Assuming that the cheque was accepted only as conditional payment of the original debt, the payee had indorsed it in blank and subsequently ceased to be its "true holder" at the time when it was stolen. The payee's indorsement converted the cheque into a "bill payable to bearer" by virtue of section 8 (3) of the Ordinance. Accordingly, "W. D. Fernando" who presented the cheque bearing the payee's genuine indorsement in blank was its "holder" at that point of time, so that payment to "W. D. Fernando" (even if he were the actual thief) operated as "a discharge of the bill". *Grant (supra) p. 193*. The circumstance that the crossed cheque was paid across the counter instead of through a Bank did not divert the proceeds into wrong hands. Indeed, the payee's failure to protect himself by making the cheque "not negotiable" was the primary cause of his loss. He was in no better position, after losing the cheque which he had indorsed in blank, than he would have

¹ (1875) 1 Q.B.D. 531.

² (1927) 96 L.J.K.B. 801.

been if he had lost a currency note which he had taken in satisfaction of the earlier debt. In such a situation, the loss clearly lies (as between himself and his debtor) where it falls.

In this case the plaintiff had delivered to the payee a cheque in precisely the form in which it was asked for, and funds were available in the Bank to meet it upon presentation. The subsequent conversion of the document, by indorsement, into a "bearer cheque" was the primary consequence of the loss sustained by the payee. Once the cheque was paid to "W. D. Fernando" the payee had no further claims upon the plaintiff; nor indeed, had he a remedy against the Bank under section 79 (2) because he was not the "true holder" of the cheque at the time that it was paid. His only remedy is against the thief if he can find him.

For these reasons I would hold that the plaintiff has not established a right to repudiate the payment by the Bank. He intended the cheque to discharge his earlier liability to the payee, and he achieved that result. Accordingly, the Bank was clearly entitled to debit his account with the sum of Rs. 2,000 paid across the counter. I would allow the appeal and dismiss the action with costs in both Courts.

SWAN, J.—I agree.

Appeal allowed.
