

1966

*Present : Sirimane, J., and Alles, J.***B. H. R. DE SILVA, Appellant, and A. P. RANASINGHE, Respondent***S. C. 758/64—D. C. Balapitiya, 1174/M*

Cheque—Dishonour—Action against indorser—Requirement of notice of dishonour—Excuses for delay in giving notice—Bills of Exchange Act (Cap. 82), ss. 49 (Rules 12 and 13), 50 (1), 50 (2) (d) (iii).

When a cheque is dishonoured, notice of dishonour is a condition precedent to a right of action against an indorser. Excuses for delay in giving notice of dishonour are limited only to those which are set down in section 50 (1) of the Bills of Exchange Ordinance.

APPPEAL from a judgment of the District Court, Balapitiya.

N. S. A. Goonetilleke, for the defendant-appellant.

S. W. Jayasuriya, for the plaintiff-respondent.

Cur. adv. vult.

November 20, 1966. SIRIMANE, J.—

The plaintiff alleged that the defendant had borrowed a sum of Rs. 3,500 from him, on the cheque produced at the trial marked P1. The cheque has been drawn by one Martin Silva, and according to the plaintiff endorsed to him by the defendant.

The cheque was dishonoured (the donor having stopped payment) and the plaintiff filed this action against the endorser (i.e. the defendant) only. He obtained judgment in his favour and the defendant has appealed.

The main ground urged by Mr. Goonetilleke for the defendant is that there has been no notice of dishonour given to the defendant as required by section 49, Rule 12, of the Bills of Exchange Act, Cap. 82, which reads as follows :—

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules :—

(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

- (a) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill ;
- (b) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on the day, and if there be no such post on the day, then by the next post thereafter.

In the prayer the plaintiff averred that he had given notice of dishonour on 5.7.61, and at the trial a copy of a notice sent by his proctor to the defendant marked P5 bearing that date was produced. The question then arises as to the exact date on which the cheque was dishonoured, and the burden was on the plaintiff to prove that date in view of the defence taken up in the answer. The evidence on the point is not very clear. According to the plaintiff's proctor he had sent the cheque to the Bank (presumably acting as plaintiff's agent) on 20.6.61 and it was returned by the Bank a "few days" later. P4 is a communication relating to the dishonour dated 29.6.61 sent by post to the plaintiff's proctor by the Bank, and one gathers that he received this communication within a "few days" of the date on P4.

The plaintiff's oral evidence on the point which the learned District Judge has accepted is that he met the defendant on the road and told him about the dishonour after the cheque had been handed to the proctor to file action. This date is very vague indeed; it was perhaps after both P4 and P5.

In this state of the evidence it was conceded by counsel for the plaintiff that notice of dishonour had not been given as required by Rule 12 quoted above or even in accordance with Rule 13 which deals with "reasonable time" when a bill is dishonoured in the hands of an agent.

The learned District Judge himself appears to have appreciated this, for he seeks to excuse the delay in the following words :

"A third party's signed cheque leaf had been brought for the purpose of being kept as security for money borrowed and the defendant is not entitled to insist on notice of dishonour reaching him on the day after the dishonour."

Excuses for delay in giving notice of dishonour which may be accepted by a Court are set down in section 50 (1). The delay must be "caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence". The fact that money had been borrowed by a person on a cheque signed by another is hardly an excuse for delay in giving notice of dishonour to the endorser, and learned counsel for the plaintiff did not seek to support this part of the judgment.

Notice of dishonour is a condition precedent to a right of action against an endorser (see *Murugappah Chetti v. Silva*¹). Respondent's counsel contended however that this was a case in which notice of dishonour should be dispensed with under section 50 (2) (d) (iii) of Cap. 82, as P1 was an "accommodation cheque". This position was not pleaded in the plaint and no issue was raised at the trial, though I must say that there is some evidence on the record from which such an inference *may* be drawn. This aspect of the matter appears to have escaped the notice of the lawyers and the learned Judge at the trial.

It would not be fair on the defendant to hold against him in appeal on a point which he was not called upon to meet at the trial.

With some reluctance we have decided to grant the application of counsel for the plaintiff that the matter be sent back for re-hearing, and in view of the order we propose to make we do not wish to make any comment on certain other matters referred to by counsel for the appellant in the argument.

The judgment and decree entered in this case are set aside and the case sent back for trial *de novo* before another judge. The parties may be permitted to amend their pleadings if they so desire. The defendant-appellant is entitled to costs of this appeal, all other costs will be in the discretion of the District Judge.

ALLES, J.—I agree.

Sent back for fresh trial.

¹ (1916) 2 C. W. R. 33.