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1965 *Present :* **Sansoni, C.J., and Sirimane, J.**

DON CORNELIS and another, Appellants, and **DE SOYSA & CO., LTD.,** Respondent

S. C. 341/62-D. C. Colombo, 50907/M

Cheques-Forgery of drawer's signature-Subsequent negotiation-Liability of holder to drawer-Action for money had and received-Maintainability-Unjust enrichment-Condictio indebiti-Bills of Exchange Ordinance (Cap. 82), s. 24 -Prescription Ordinance (Cap. 68), s. 7.

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An action for money had and received by the defendant to the use of the plaintiff, which the plaintiff is entitled to recover, is maintainable. It is founded on the same principle of equity as the Roman-Dutch Law action of condictio indebiti.

Twenty cheques crossed and marked " Not Negotiable " were stolen before they were delivered by the drawer to the payees and, after the indorsements of the respective payees were forged, were given by a clerk of the drawer for valuable consideration to the defendants, who had them credited to their account at their Bank. The defendants were at fault when they cashed so many cheques at the request of the clerk, some of them for large amounts, without taking the slightest precaution to ascertain from the clerk what right he had to them. On the other hand the drawer's conduct was entirely innocent. The present action was instituted by the drawer against the defendants on the basis that the amounts credited to the account of the defendants by their Bank were money had and received by them to the use of the plaintiff.

Held, that the forged indorsements were wholly inoperative under section. 24 of the Bills of Exchange Ordinance. Although the defendants obtained the amounts of the cheques from their Bank, which collected the amounts from the drawer's Bank, the defendants had no right to these monies, because they were obtained without the plaintiff's consent or even knowledge. Moreover, it could not be argued that as between the plaintiff and the defendants the equities were equal. Accordingly, the plaintiff was entitled to recover from the defendants the amounts of the cheques as money had and received to the use of the plaintiff.

Daniel Silva v. Johanis Appuhamy (67 N. L. R. 457) distinguished.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with W. D. Gunasekera and D. R. M. Daluwatte for Defendants-Appellants.

C. Ranganathan, Q.C., with J. V. M. Fernando, for Plaintiff-Respondent.

Cur. adv. vult.

December 16, 1965. **SANSONI, C.J.-**

The plaintiff-company sued the defendants, who were carrying on business in partnership, to recover a sum of Rs. 7,962/12 on twenty-two causes of action. In respect of each cause of action the plaintiff pleaded that it had drawn a cheque crossed and marked "Not Negotiable". Instead of being delivered to the payee, the cheque was stolen and the payee's indorsement forged. The defendants thereafter, though they had no title to the cheque, sent it for collection to their Bank, which credited their account with the amount of the cheque, while the plaintiff's Bank correspondingly debited their account.

Evidence was led in respect of all but two of the cheques (in the case of those two cheques the payees were not called), and it was proved that the alleged indorsements were not made by the payees of twenty of the cheques. The plaintiff's case was that the twenty cheques were at all times their property, because they were never issued to the respective payees. Consequently, the plaintiff claimed, the money credited to the defendant's account in respect of each cheque was money had and received by the defendants to the use of the plaintiff, which the plaintiff was entitled to recover.

The defendants pleaded that:-

(1) they had the authority of the plaintiff to cash these cheques,

(2) the plaintiff was estopped from denying that the defendants had authority to cash these cheques.

(3) all the cheques were cashed by them in the ordinary course of business,

(4) they were holders in due course,

(5) the plaintiff or its agent had been guilty of negligence,

(6) the plaint disclosed no cause of action, and

(7) the claims were prescribed.

The only evidence led to establish these defences was that of the 1st defendant, and it fell far short of proving the alleged authority, or negligence, or estoppel. The 1st defendant merely said that he had cashed these cheques at the request of one Francis who used to be a clerk in the plaintiff's estate department. Francis used to bring the cheques, but the payees did not accompany him. Once or twice he questioned Francis as to why he brought cheques drawn in favour of other people. Sometimes Francis used to take cash, and sometimes the cheques were credited to his account with the defendants. He never asked Francis how he got cheques drawn in favour of third parties.

It is obvious that Francis who, according to the evidence, had been sent to jail in connection with cheque frauds, was responsible for the forgery of the payee's signature on each of these cheques. The cheques were never the property of Francis, who probably stole them from the plaintiff. He could not, in any case, give the defendants any title to them, and the forged indorsements were wholly inoperative under section 24 of the Bills of Exchange Ordinance, Cap. 82. Although the defendants obtained the amounts of the cheques from their Bank, which collected the amounts from the plaintiff's Bank, the defendants had no right to these monies. In the result, the defendants obtained monies belonging to the plaintiff, without the plaintiff's consent or even knowledge.

The question is whether the plaintiff has any remedy against the defendants under these circumstances. The District Judge gave judgment for the plaintiff, and the defendants have appealed. Their Counsel relied on the recent case of Daniel Silva v. Johanis Appuhamy[1 (1965) 67 N. L. R. 457.]in which the facts were very similar. The three Judges who heard that appeal unanimously decided that as the cause of action pleaded there

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was conversion, the plaint did not disclose a cause of action, inasmuch as the English doctrine of conversion is not applicable in Ceylon. That decision is binding on us. But I do not think it applies to this case because the plaintiff here has not claimed damages on the ground of conversion. The plaint is framed, instead, on the ground that the amounts recovered by the defendants were money had and received by them to the use of the plaintiff. It is well-established in England that a plaintiff is, under these circumstances, entitled to waive the tort of conversion and sue instead for the amount of the cheques as money had and received to its use. In the case cited, Tambiah J. alone expressed the view that the action for money had and received is unknown to our law. I regret that I am unable to accept this dictum, which was not necessary for the decision of that case.

The action for money had and received in its common law form no longer exists even in England, since the Judicature Act, 1873, abolished the forms of action altogether. But the principle of the action has been often followed in Ceylon, as it still is in England and other countries which have the common law. I need only refer to the case of Dodwell & Co. Ltd. v. John[1 (1918) 20 N. L. R. 206.] decided in the Privy Council. There is also the case of Saibo v. The Attorney-General [2 (7923) 25 N. L. R. 321] in which Bertram C.J. referred to the action for money had and received, and said that the English law on the subject may be treated as identical with the law of Ceylon. The Prescription Ordinance of 1871, Cap. 68, provides in section 7 for claims for the action for money received by defendant for the use of the plaintiff.

The principle underlying the action is that money which in justice and equity belonged to the plaintiff has been received by the defendant under circumstances which rendered its receipt a receipt by the defendant for the use of the plaintiff. Lord Sumner in Sinclair v. Brougham [(1974) A. G. 398.] said that it was grounded upon a notional or imputed promise to repay, but in the same case Lord Dunedin said " An action founded on a jus in re, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him." And again, "It is clear that all ideas of natural justice are against allowing A to keep the property of B which has somehow got into A's possession without any intention on the part of B to make a gift to A." More recently, Lord Denning in Kiriri Cotton Co. Ltd. v. Dewani[. 4 (1960) A. C. 192.] referring to the action for money had and received said that it is not an action on contract or even imputed contract "It is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. This was explained by Lord Wright in the Fibrosa case (1943) A. C.32. All the particular heads of money had and

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received, such as money paid under a mistake of fact, paid under a consideration that has wholly failed, money paid by one who is not in part delicto with the defendant, are only instances where the law says the money ought to be returned."

The rules applicable to claims to money had and received and for restitution are closely connected with the doctrine of unjust enrichment, which proceeds on the basis that the defendant has received some property of the plaintiff, or some benefit from the plaintiff, for which it is just

that he should make restitution.

I concur, with respect, in the view of Tambiah J. expressed in Perns v. The Municipal Council of Galle [1 (1063) 65 N. L. K. 555.], that this doctrine ofunjust enrichment is part of our law. It follows that there is no inconsistency in applying the principle of the action for money had and received, which is founded on the same principle of equity as the Roman-Dutch Law action of condictio indebiti, and is " a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money "-see the judgment of Schneider J. in The Imperial Bank of India v. Abeyesinghe.[- 2(1927) 20 N. L. R. 357.]" There is no principle of equity which appears more frequently in Roman Law, and in more diverse connexions, than the prohibition of unjust enrichment at the expense of another. He who has come into possession of property not his own, even though the acquisition might have been made accidentally or by mistake and without deliberate fraud, is under a strict obligation to return it or its value to the true owner. This was the foundation of the important action of condictio indebiti and in the main of the praetors' wide discretionary remedy of in integrum restitutio. Among innumerable statements of the principle in the Corpus luris, the most succinct and characteristic is that of Pomponius : ' lure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem ' (D. 50. 17.206) "-C. K. Alien, Law in the Making (6th Edition) p. 379. Lee and Honore in The South African Law of Obligations, sections 681 and 695, refer to the same principle ofrestitution. When one person's property comes into the hands of another without lawful justification, the latter must, if he cannot restore the property, pay the former the value of any benefit derived from it.

On the facts proved in this case I would hold that the defendants are under a duty to make restitution of the proceeds of the twenty cheques which bore forged indorsements. They were always the property of the plaintiff, and " a holder under a forged indorsement, if paid, must make restitution either to the payer or to the true owner ..... Liability does not depend in these cases on the innocence of the defendant, who may be a purchaser in good faith but has dealt with the goods without title and without the owner's authority"-see Legal Essays and Addresses by Lord Wright, pages 42 and 54, where the author reviews the American Restatement of the Law of Restitution.

It was urged for the defendants that in the absence of proof of dolus or culpa they would not be liable. This is to confuse their delictual liability with their liability to make restitution. " Restitution ", as Lord Wright has said at page 36 of the same work, " is not concerned with damages, or compensation for breach of contract or for torts, but with remedies for what, if not remedied, would constitute an unjust benefit or advantage to the defendant at the expense of the plaintiff. "

In my view the plaintiff has shown that the defendants had no lawful justification for receiving the proceeds of the twenty cheques which bore forged indorsements.

But it is argued that the defendants gave Francis cash or goods in exchange for those cheques, and it would be unjust to require them to pay the plaintiff, for they would then be paying twice over. I do not consider this a valid argument. The 1st defendant has in his evidence demonstrated that the defendants were at fault when they cashed so many cheques, some of them for large amounts, without taking the slightest precaution to ascertain what right Francis had to them. Any reasonable man, particularly one engaged in trade, would have enquired how these cheques came into the hands of Francis, who brought them unaccompanied by the payees. On the other hand, the plaintiff's conduct has been entirely innocent. It made no representation which could have misled the defendants, and was obviously unaware of the defendants' unauthorised handling of its property. It received no benefit whatever from these transactions. It cannot be argued that as between the plaintiff and the defendants the equities are equal. This is the test adopted by

Denning L.J. (as he then was) in Lamer v. London County Council[1(1949) 2 K .B. 683.] dealing with the analogous claim to money paid under a mistake of fact.

I would dismiss the appeal with costs.

SIRIMANE, J.-I agree.

Appeal dismissed.

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