PRIVY COUNCIL

Mercantile Bank of India Ltd.

Vs.

Central Bank of India Ltd.

P.C.A.No.54 of 1936
(Lord Wright, J. Sir George Lowndes and Sir George Rankin.JJ.)

03.12.1937

JUDGMENT

LORD WRIGHTJ.

1. The appellants and the respondents are limited companies carrying on the business of bankers in Madras. The appeal is against the judgment of the Appellate Court of Madras who have held the appellants liable to the respondents for the conversion of their property. The question arises out of a series of frauds committed by a firm of merchants named C. K. NarayanaIyer and Sons, who will be referred to hereinafter as "the merchants. " They were a firm who, until the frauds became disclosed, had enjoyed the highest standing and repute in Madras where they carried on a large business as buyers and exporters of ground-nuts. Their practice was to purchase the ground-nuts from the up-country growers and have them dispatched by rail to Madras. The railway companies and the Madras Port Trust, which had its own railway system within the Port, had a working arrangement between them under which the Trust took over the consignment of nuts on their arrival at the Port and lodged them in the first instance in their godowns. The ground nuts were covered in respect of each consignment or wagon load by a document called' a "railway receipt, " which contained particulars of the goods and the names of the consignor and consignee. In all the consignments in question in these proceedings, the merchants were entitled to obtain delivery of the goods under the railway receipts, either because they were named as the consignees or because, if they were not so named, the document had been endorsed by the named consignee. The railway receipts contained conditions to the effect that the railway receipt must be given up at destination by the consignee, failing which the railway might refuse to deliver, and that the signature of the consignee or his agent in the delivery book at destination should be evidence of

complete delivery. They also provided that if the consignee did not himself attend to take delivery, he must endorse on the receipt a request for delivery to the person to whom he wished it to be made.

2. Both the appellants and the respondents had been in the habit of making loans to the merchants on the security of the goods covered by the several railway receipts; the practice was that the merchants should deliver to the bank the relevant railway receipts by way of pledge, giving at the same time to the bank a promissory note for the amount advanced and a letter of lien. The bank would then pass the railway receipts on to their own godown keeper so as to enable him to obtain possession of the goods. What was in practice then done was for the bank's godown keeper, in order to avail himself of the merchants' services, to hand the railway receipts back to the merchants, but only for the specific purpose of clearing the goods from the Port Trust and storing them in the bank's godown. The character and effect of this course of business was discussed by the Board in *Official Assignee of Madras v. Mercantile Bank of India,* It was there held that the railway receipt was a document of title within the meaning of Section 178 Contract Act, 1872, and that a pledge of the railway receipt operated under that section, which was in force at material times but has since been repealed, as a pledge of the goods, though by the general law a pledge of documents is not prima facie deemed to be a pledge of the goods. It was also held by the Board in that case that the pledgee did not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the merchants or their agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Fort Trust and putting them into the bank's godown. It was said by the Board that such a procedure was in the usual course of business and was obviously either necessary or at least convenient for the conduct of the business.

3. The railway receipts concerned in this case were 35 in number. The merchants, in accordance with the practice and for the purpose described above, were given by the respondents the receipts and they fraudulently obtained a second advance from the appellants. It was found that in January and February 1929 the merchants followed a systematic course of fraud in their dealings with both the appellants and the respondents. After having obtained railway receipts from either the appellants or the respondents, as the case might be, they repledged them with the other bank, that is to say, if the railway receipts had been pledged in the first instance with the appellants they took them to the respondents and obtained advances on them as if they had not been already pledged, and conversely, if they had been first pledged with the

respondents they took them to the appellants and obtained advances from them. There was however one difference between the two banks, in that the practice of the appellants was to place their stamp on the railway receipt when they took it by way of pledge. That practice was not adopted by the respondents until about the end of the period covered by the fraudulent operations. The addition of the stamp had no effect in law and was not, it seems, generally adopted by banks, but it would naturally, according to the evidence, put the other bank on inquiry. The merchants however were not unequal to dealing with this complication. They followed the simple process of obtaining delivery of the goods if the railway receipts bore the bank's stamp and thereupon pledging the goods themselves with the other bank. It was rightly not contested that such a pledge of the actual goods was invalid. In due course the frauds became known and the merchants were declared insolvent. Thereupon the respondents brought against the appellants an action for conversion out of which the present appeal arises. It was found by the trial Judge, and is not now contested, that the respondents having obtained a valid pledge of the goods from the merchants by the pledge of the receipts, did not lose their rights as pledgees by what the merchants then did when they purported to pledge the goods with the appellants. This followed from section 178, Contract Act, 1872, as interpreted in *Official Assignee of Madras v. Mercantile Bank of India,* This section, in force at material times, though since repealed, is in the following terms:

> 178. A person who is in possession of any goods, or of any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents; Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly; Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.

4. It has been found in the Courts below that the merchants obtained the documents or goods by means of an offence or fraud within the meaning of the section, because the true inference from the facts was that they obtained the documents with no intention of fulfilling their duty as mandatories but with the dishonest intention of perpetrating the frauds which they actually committed. The correctness of that ruling was not challenged before the Board. The appellants however claimed that they were entitled to succeed in the action on the ground which is set out in their amended defense in the following paragraph :

> The plaintiff bank having placed C. K. N. and Sons in possession of the railway receipts without anything therein to indicate that the plaintiff bank had any interest therein or that C K. N and Sons were not the owners thereof, enabled C. K. N. and Sons to hold themselves out as the owners thereof and thereby to pledge the said railway receipts for value with the defendant bank, who acted in good faith, and the plaintiff bank is therefore estopped from setting up its title against that of the defendant bank to the relative goods or their value.

5. It has been this plea which has been the subject of debate in the present appeal. Both Courts below have decided against it. It is admitted that the respondents made the advances completely bona fide; they only did what they had done for some time previously without any misadventure. They had regularly had dealings with the merchants over a prolonged period. The merchants were a firm of the highest standing and reputation of whose rectitude and solvency there had been no question or suspicion. In delivering the railway receipts to the merchants the respondents followed a practice which had long been consistently followed both by the appellants and the respondents. No authority had been given to the merchants to deal with the goods otherwise than by handling them for the limited purpose which has been stated. On these facts it would prima facie seem impossible to say that the respondents made any representation to the appellants that the merchants had authority or were entitled to obtain an advance on the goods for themselves. There would appear to be no reason for saying that the respondents committed any breach of any duty owing either to the appellants or to anyone else. All that the respondents did was, it would seem, to deal with their own property, as pledgees, in the usual course of business which was well known to and had been followed both by the appellants and the respondents. It would seem accordingly, that they were entitled to rely on the rule of law that no one could transfer a better title than he possessed, save in the exceptional cases not here material, such as sales in market vert or where there has been a transfer of property avoidable on the ground of fraud but not yet avoided or where the special provisions of the Factors Acts apply. It has however been strenuously contended on behalf of the appellants that the circumstances here raise what is called an estoppel, and that the respondents are precluded by their conduct from denying as against the appellants that the merchants had the right, which they pretended to have, of pledging the goods as owners, the *bona fides* of the appellants not being in question. The estoppel is relied on as giving to the appellants the substantive right of claiming a valid pledge of the goods, taking priority over the pledge to the respondents, since though estoppel has been described as a mere rule of evidence, it may have the effect of creating

substantive rights as against the person estopped. of the many forms which estoppel may take, it is here only necessary to refer to that type of estoppel which enables a party as against another party to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence or by conduct or by representation or by a holding out of ostensible authority. The argument has been variously put on behalf of the appellants. They have claimed to succeed upon the broad rule stated by Ashhurst J. in *Lickbarrow v. Mason,* that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. " The decision of the Board in *Commonwealth Trust Co. v. Akotey* was cited as one in which it was said that the case was a plain case for the application of that principle. The facts were that a grower of cocoa in the Gold Coast Colony had consigned by railway cocoa to a merchant at the port in the expectation of his buying the cocoa. The merchant, instead of concluding the purchase, purported to sell the cocoa as for himself to a third party, the appellants, who purchased in good faith and paid the full price to the merchant as seller. In an action for conversion brought by the grower, the Full Court of the Gold Coast held that no property had passed because the merchant had no title. That judgment was reversed by this Board, who said that :

> To permit goods to go into the possession of another, with all the insignia of possession thereof and of apparent title, and to leave it open to go behind that possession so given and accompanied, and upset a purchase of the goods made for full value and in good faith, would bring confusion into mercantile transactions, and would be inconsistent with law and with the principles so frequently affirmed, following *Lickbarrow v. Mason,*

6. What is there stated, it may be, would cover this case if it is applied without qualification. But in their Lordships' judgment it is impossible to accept without qualification as a true statement of law the principles there broadly laid down. It may well be that there were facts in that case not fully elucidated in the report which would justify the decision, but on the face of it their Lordships do not think that the case is one which it would be safe to follow. This was, it seems, the opinion of Lord Sumner, who, in a striking instance of a case where estoppel by conduct or representation was negatived, the case in *Jones Limited v. Waring and Gillow Ltd.,*

7. There was no duty between Jones, Ltd., and Waring and Gillow, Ltd., and without that, the wide proposition of Ashhurst J. in (1787) 2 Term Rep 63 would not apply [see observations of Lord Macnaghten and Lord Lindley in *Farquharson and Co. v.*

*King and Co*and of Lord Parmoor in *London Joint Stock Bank v. Macmillan,* which were apparently overlooked in *Commonwealth Trust Co. v. Akotey,* 8. Lord Sumner thus puts the principle of estoppel as depending upon a duty. The passage to which he refers in Lord Parmoor's speech in (1918) AC 777, pointed out that the rule expressed by Ashburst J. was too wide and said that the accurate rule was stated by Blackburn J. in *Swan v. North British Australasian Co., (1863) 2 H and* There Blackburn J. referring to the judgment in the Court below of Wilde B. said:

> He omits to qualify the rule he has stated by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy.

9. To the same effect in *Farquharson and Co. v. King and Co at page 342* Lord Lindley said :

> INPARA = It is, of course, true that by employing Capon (the fraudulent clerk) and trusting him as they did, the plaintiffs enabled him to transfer the timber to anyone; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense, every one who has a servant enables him to steal whatever is within his reach.

10. Lord Lindley then pointed out that the dictum of Ashhurst J. is too wide. This has been pointed out by other Judges. It was indeed not necessary to the decision of the case which was before Ashhurst J. The case in (1926) AC 72 is also inconsistent with the case in *Johnson v. Credit Lyonnais,* where it was held that the conduct of the plaintiff in leaving the dock warrants, which were the indicia of title, in the hands of a vendor of the goods after he had been paid by the plaintiff as purchaser, without any change being made in the books of the dock company, did not disentitle the plaintiff from claiming for conversion against the defendants, who in good faith made advances to the fraudulent vendor on the security of the dock warrants thus left in his hands. In one sense the plaintiff by leaving the indicia of title in the vendor's hands had enabled him to defraud the defendants, but it was held by the Court of Appeal that, in the words of Cockburn C. J. :

> The case for the plaintiffs rests on the general proposition of law-which as a general proposition cannot be contested-that the mere possession of the property

of another, without authority to deal with the thing otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party however innocent in the transaction the latter party may have been.

11. The Chief Justice adds that if it were held that in such a case there was an estoppel, the Factors Acts, which give a limited protection in certain cases to the unauthorized sale of goods, would have been unnecessary. In their Lordships' judgment, it cannot be said that the respondents owed any duty to the appellants in the matter. There was no relationship of contract or agency. They had no reason to think that the documents would ever be handed to the appellants. Mr. Miller's contention that estoppel does not depend on the existence of a duty is, in their Lordships' judgment, refuted by the authorities already cited and many other like authorities which it is not necessary to cite.

12. Mr. Miller however argued that the necessity of a duty to constitute an estoppel only applied to an estoppel based on conduct or negligence, whereas an estoppel based on representation was different. He contended that the mere form of the railway receipts contained a representation by the respondents to any person to whom the merchants might produce it, that the merchants had the power to obtain a pledge on the security of the goods. There was, he contended, in this way a representation of authority which bound the respondents because it enabled the merchants to mislead the appellants. No question of duty or negligence arose on this view of the position, so he submitted. The document on its face conveyed a representation when presented by the merchants to the respondents that the merchants were invested with full disposing power. No authority was cited which in their Lordships' judgment would justify any such wide proposition. It is not indeed true to say without qualification that people are not bound to contemplate the possibility of, or take precautions against, forgery or fraud being committed. (1918) AC 777 is a case in which the bank's customer was held liable because he had facilitated the fraudulent alteration of a cheque by so drawing the cheque as to leave a space which the forger could fill up and thus alter the amount of the cheque. But that decision was expressly based on the existence of a duty arising from the contract between banker and customer and was distinguished on that ground from *Scholfield v. Londenborough,* where any duty was negatived. Even if there is a duty as between the banker and the customer in drawing a cheque, it must be shown that there was a breach of the duty by the neglect of some usual and proper precaution. It was by the absence of such proof that the case in *Slingsby v. District*

Bank Ltd., was distinguished from the case in *London Joint Stock Bank v. Macmillan,.* In the present case not only was there an absence both of any duty or of anything amounting to a neglect of usual precautions, but there was in their Lordships' judgment no ground for finding any representation. There was no reason for the respondents to think that they were representing to any body that the merchants had any title to dispose of the goods. The railway receipts were not dangerous things; there was no question of arming the merchants with them. It is only in special conditions of fact that an estoppel by representation can be established.

13. There are very few cases of actions for conversion in which a plea of estoppel by representation has succeeded. Such a case was (1895) 1 QB 521 which was relied on by Mr. Miller. There was in that case an actual transfer of goods lying in a warehouse, to the order of Fletcher, a transfer made on the express instructions of the owner of the goods, who was induced to do so by Fletcher's fraud : Fletcher then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods to Fletcher's order. That was held to be a case where both the warehouseman and the owner were estopped from denying the rights of the purchaser. The warehouseman had in fact attorned to the purchaser and it was also held that there had been a holding out by the true owner of the goods that Fletcher was capable of giving a good title. That was a very different case from the present. A similar principle of holding out has been applied in the cases where a share certificate with a transfer in blank has been placed in the hands of a stockbroker or one in a similar position, and where it has been held that there was a representation which constituted an estoppel. Such a case is illustrated by *Henderson v. Williams*where the plaintiff had left share certificates in the hands of stockbrokers, the certificates were in the name of a person from whom the plaintiffs had bought the shares and bore upon them an endorsed form of transfer executed by the seller. The stockbrokers used the certificates in order to obtain an advance for themselves. On their bankruptcy, the plaintiff claimed the certificates from the pledgees, but it was held that he was estopped from setting up his title as against them. The instrument was held to carry with it a representation of authority in the person entrusted with it to deal with it and if produced to a third person, calculated to convey to that third person that such an authority exists. On the facts of such a case there was in addition to the form of the document, the character of the person in whose hands it was. As was said in *Fuller v. Glyn, Mills, Currie and Co*by Lord Watson: "brokers in the ordinary course of business are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customers" and accordingly it was reasonable

assumption that the broker had full authority to deal with the securities. It is not necessary to discuss such cases further or express any opinion about them, because the material circumstances were not present here. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was, at the best, an ambiguous document. Its possession no more, conveyed a representation that the merchants were entitled to dispose of the property than the actual possession of the goods themselves would have conveyed any such representation. It is not like a negotiable instrument; the possession of the railway receipt is no more significant for this purpose than the possession of the goods would have been. It is clear that no plea of estoppel could be raised in the cases where the merchants pledged the goods themselves after having obtained delivery under the railway receipt. It is not necessary to refer to cases where an agent entrusted with documents with a specific authority to deal with them for his principal, has fraudulently used them for his own purposes. Such cases are quite different.

14. Nor is there any basis for the contention that the respondents are liable because they omitted the precaution of putting their stamp upon the railway receipts in regard to the transactions in question; it is true that at a later date the respondents did stamp the railway receipt and that the appellants in practice did so throughout, but it is clear in their Lordships' judgment, that that would have made no difference to the course adopted by the merchants. If the stamp had the effect of putting the bank on enquiry, the merchants would not adopt the method of seeking to obtain a second advance on the documents, but would have taken delivery under the receipt of the actual goods and pledged them, or if they did seek to obtain a second advance on the documents and had been asked by the bank to explain why the railway receipt was stamped, might have said that they had pledged the documents and redeemed that pledge. Having regard to the position which they held, that explanation would, presumably, have been accepted. There is however a more general answer to any argument based upon the respondents' failure to stamp. It is not suggested that it was a usual practice, so that failure to adopt it could be charged against the respondents, but even if it were, it would still be of no avail to the appellants because there was no duty as between the appellants and the respondents to adopt any such practice. As already pointed out, the existence of a duty is essential, and this is peculiarly so in the case of an omission. This is so even if the case were put on representation on holding out. The duty may be, in the words of Balckburn J., "to the general public of whom the person is one. "

There is a breach of the duty if the party estopped has not used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority. In their Lordships' judgment the appellants fail to establish these conditions.

15. Section 115, Evidence Act, does not call for particular discussion here. It is conceded that the law it enacts is the same as the English law : see *SaratChunderDey v. GopalChunderLaha, at p. 215*. For these reasons their Lordships are of opinion that the appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Appeal dismissed.

Cases Referred.

(1934) 21 AIR PC 246=(1935) AC 53=152 IC 730=61 IA 416=58 Mad 181= 104 LJ PC 1=152 LT 170 (PC).

(1934) 21 AIR PC 246=(1935) AC 53=152 IC 730=61 IA 416=58 Mad 181= 104 LJ PC 1=152 LT 170 (PC).

(1787) 2 Term Rep 63= 1 HB1 357=6 East 21=1 RR 425 at p. 70,

, (1926) AC 72=94 LJ PC 167=41 TLR 641=134 LT 33

(1787) 2 Term Rep 63= 1 HB1 357=6 East 21=1 RR 425.

(1926) AC 670=95 LJ KB 913=135 LT 548=32 Com Cas 8=70 SJ 756=42 TLR 644.

., (1902) AC 325=71 LJ KB 667=86 LT 810=51 WR 94=18 TLR 665

(1918) AC 777=88 LJ KB 55=119 LT 387=23 Com Cas 415=62 SJ 650=34 TLR 509

(1926) AC 72=94 LJ PC 167=41 TLR 641=134 LT 33.

C 175=32 LJ Ex 273=10 Jur (NS) 102=11 WR 862 at page 182.

., (1902) AC 325=71 LJ KB 667=86 LT 810=51 WR 94=18 TLR 665

(1878) 3 CPD 32=47 LJ CP 241=37 LT 657=26 WR 195

(1896) AC 514 = 65 LJ QB 593=75 LT 254=45 WR 124

(1932) 1 KB 544 = 101 LJ KB 281 = 146 LT 377=37 Com Cas 39=48 TLR 114=41 LI L Rep 138

(1918) AC 777=88 LJ KB 55=119 LT 387=23 Com Cas 415=62 SJ 650=34 TLR 509

., (1914) 2 KB 168=83 LJ KB 764=110 LT 318=19 Com Cas 186=58 SJ 235=30 TLR 162 .

(1893) 20 Cal 296=19 IA 203=6 Sar 224 (PC)

(1895) 1QB 521=64 LJ QB 308=14 R 375=72 LT 98=43 WR 274