

Central National Bank Ltd.

Vs

United Industrial Bank Ltd.

Civil Appeal No. 32 of 1953

(B.K. Mukherjea, N.H. Bhagwati, B. Jagannath Das JJ)

26.11.1953

JUDGMENT

MUKHERJEA J. -

This appeal is directed against a judgment and decree of an appellate bench of the Calcutta High Court dated the 12th of March, 1951, reversing, on appeal, the decision of a single Judge of that court passed in Suit No. 1112 of 1946.

The suit, out of which this appeal arises, was commenced by the Central National Bank Limited, the appellant before us, in the Original Side of the Calcutta High Court, for a declaration that the bank acquired the rights of a pledge in respect of two blocks of shares in two companies, to wit, the Indian Iron and Steel Company Ltd. and the Steel Corporation of Bengal Ltd. and was entitled to sell the shares in enforcement of the pledge. There was a claim for recovery of possession of these shares and also for damages alleged to have been suffered by the plaintiff by reason of wrongful denial of its title by the defendant bank.

The shares, to which the dispute relates, are 800 in number and admittedly they were the property of one Radhika Mohan Bhuiya, the defendant No. 2 in the suit. Sometime in February, 1946, Bhuiya agreed to sell these shares to one Dwijendra Nath Mukherjee for the price of Rs. 38,562-8-0. On 14th February, 1946, Bhuiya sent these shares along with the relative transfer deeds to the defendant bank with instructions to deliver over the share certificates and the transfer deeds to the purchaser, against payment of the entire consideration money stated above. On the 18th February following, the defendant bank directed one of its officers, to wit, Nilkrishna Paul, to see Mukherjee at his office and hand over to him the share after receiving from him a pay order for the sum of Rs. 38,562-8-0 signed by the Punjab National Bank. In accordance with this direction, Paul went to the office of Mukherjee and saw him at his chamber at about 11 a.m. in the morning. Mukherjee asked for the shares, but Paul refused to make over the share certificates to him unless the pay order was given. Mukherjee then said that he wanted to have a look at the shares and the transfer deeds just to satisfy himself that they were all right. After that Paul placed the shares and the transfer deeds on the table. Mukherjee examined the share certificates one after another and when he was about to leave the chamber along with the share certificates and the blank transfer deeds, Paul raised an objection and asked him not to go away without giving him the pay order. Mukherjee then said to Paul : "I am going out to get the pay order; it is ready. You take your seat; I am coming." With these words Mukherjee went out of his chamber and did not return thereafter. It appears that he went straight to the office of the plaintiff bank and pledged the shares with it, taking an advance of Rs. 29,000 in terms of an agreement which was previously arrived at between them. What happened in substance this : Mukherjee gave a cheque for Rs. 100 with which an account in his name was

opened for the first time with the plaintiff bank, and the advance of Rs. 29,000 was given to Mukherjee by way of overdraft on this current account. Mukherjee also executed a promissory note for the said amount in favour of the plaintiff. It is the common case of the parties that Mukherjee has not been heard of since then and his present whereabouts are unknown. Coming now to Paul, the defendant's officer, after waiting vainly for Mukherjee, he had no other alternative but to come back to his office and inform his superior officer of all that had happened. A complaint was then lodged with the police on behalf of the defendant bank. The cheque, which was given to the plaintiff by Mukherjee, was dishonored when it was presented for the payment. The plaintiff bank thereupon wrote a letter to Mukherjee demanding payment of the loan at once and threatening to sell the shares in the case of default. As no reply came from Mukherjee, the plaintiff sold these shares through a broker named Jalan. Jalan took delivery of the shares and gave the plaintiff a cheque for Rs. 16,000 in part payment of the price. The payment of the cheque, however was stopped and the police, who had already taken the matter in hand, took possession of the shares. As Mukherjee could not be traced, a criminal case was started against an alleged accomplice of his, named Shaw, but this proved unsuccessful and Shaw was acquitted. The defendant bank, who had paid the full price of these shares to Bhuiya, then presented an application to the Magistrate, praying that the shares might be returned to it on the ground of its being the owner thereof. On getting information of this application, the plaintiff bank instituted the present suit, allegation in substance being that the plaintiff being the pledgee of the shares was entitled, in law, to the possession thereof. As has been stated already, Bhuiya, having been paid off by the defendant bank, had no further interest in the litigation. The fight was thus entirely between the two banks.

It is not disputed that Mukherjee did not acquire any legal title to the shares. There was only an agreement for sale between him and Bhuiya, and under the terms of the contract the property in the shares could not pass to him till the price was paid. The plaintiff bank, therefore, was not a pledgee of the shares from the real owner. It rested its claim entirely upon the provision of section 30(2) of the Indian Sale of Goods Act, the language of which is as follows :-

"Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of the title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist."

The plaintiff's case was that it received the shares by way of pledge in good faith and without notice of any defect in the title of Mukherjee who had agreed to purchase these shares from Bhuiya and had actual possession of the same with the consent of the seller. Consequently, the pledge would be effective under the provision of Section 30(2) of the Sales of Goods Act in the same way as if the right of the original seller did not exist.

The contention of the defendant bank on the other hand was that Mukherjee was not in possession of the shares with the consent of the seller, nor was the plaintiff a bona fide pledgee without notice of the defect of title. The whole controversy thus centered round the point as to whether on the facts that transpired in evidence, the plaintiff bank was entitled to avail itself of the provision of section 30(2) of the Indian Sale of Goods Act. Mr. Justice Sarkar of the Calcutta High Court, who tried the suit, decided this question in favour of the plaintiff. The learned Judge was of opinion that Mukherjee had obtained possession of the shares with the consent of Bhuiya or rather his agent, the

bank officer, within the meaning of section 30(2), Indian Sale of Goods Act, and it was not at all material for purposes of this sub-section that the consent was induced by fraud of Mukherjee or that his act amounted to an offence of "larceny by trick" according to English law. It was further found that the plaintiff acted in good faith without notice of any defect of title; and in view of these findings the trial Judge decreed the plaintiff's suit.

There was an appeal by the defendant against this judgment which was heard by a bench consisting of Trevor Harries C.J. and Banerjee J. The learned Judges allowed the appeal and reversed the judgment of the trial court holding that the defendant's agent never consented to Mukherjee's obtaining possession of the shares as buyer. There was no intention to give delivery at all. It was Mukherjee who took the shares and bolted and "his act was as much theft as if he had taken them out of Nilkrishna Paul's pocket". It is against this decision that the present appeal has come before us at the instance of the plaintiff and the point for consideration is, whether the view taken by the appellate bench of the High Court is right.

Mr. Mullick, who presented the appellant's case with commendable fairness and ability, has argued before us that on the facts of this case the appellate court ought to have held that the plaintiff did acquire the rights of a pledgee in respect to the disputed shares under the provision of section 30(2), Sale of Goods Act. There is no dispute, he says, that there was a valid contract of sale regarding these shares between Bhuiya, the real owner, and Mukherjee; and that the plaintiff was a bona fide pledgee from Mukherjee without notice of any other's rights has been found as a fact by the trial Judge and this finding has not been reversed in appeal. The only other thing necessary to entitle the plaintiff to claim the protection of section 30(2) of the Act is to show that Mukherjee obtained possession of the shares with the consent of the seller or his agent, and it is on this point alone that the courts below have taken divergent views. It is argued by the learned counsel that the word "possession" used in the section means nothing else but physical custody and whether there was consent of the owner or not has to be determined with reference to the definition of "consent" as given in section 13 of the Indian Contract Act. If there was consent in fact, it is immaterial that it was induced by fraud or misrepresentation and in the determination of this matter, no principle of criminal law and much less the technicalities of the English criminal law should be imported. On the facts the learned counsel argues that the defendant's agent really consented to part with the possession of the shares and allow Mukherjee to have them, although he was duped by the false promise given by Mukherjee which the latter never intended to keep.

The propriety of the propositions of law put forward on behalf of the appellants has not been, for the most part, controverted by Mr. Banerjee, who appeared for the defendant respondent. The dispute between them, as we shall presently see, is mainly on the point as to whether, on the facts of the case, it could be held that Mukherjee got possession of the shares with the consent of the defendant's agent. As, however, the points of law have been discussed in the judgments of the courts below and reference has been made by the learned Judges to a number of English cases turning upon analogous provisions in cognate statutes in England, we think it proper to express our views shortly on the points raised, just for the purpose of clearing up any doubt that might exist regarding the meaning and implication of the word "consent" as has been used in section 30(2) of the Sale of Goods Act. The two principal questions that require consideration are : first, whether the consent necessary under section 30(2) of the Sale of Goods Act must be a free consent uninfluenced by fraud or false representation, and secondly, whether the existence of such consent is negatived, as a matter of law, if a person of the requisite description mentioned in the section obtains possession of goods from the owner by trick or other deceitful means which makes his act punishable as a crime. There is no decision on these points by any High Court in India and we have been referred to a

number of cases decided by English courts where similar questions have arisen in regard to the provisions of section 25(2) of the English Sale of Goods Act and section 2(1) of the Factors Act which employ almost the same language with reference to dispositions made by a purchaser or mercantile agent who obtained possession of goods with the consent of the real owner. It is neither necessary nor desirable for our purpose to enter into a detailed discussion of the English cases that have been cited before us. We would only examine, where necessary, the salient principles upon which the leading pronouncements of the English Judges purport to be based and see whether they throw any light on the questions that require consideration in this case.

We agree with the learned counsel on both sides that the word 'consent' as used in section 30(2) of the Sale of Goods Act means "agreeing on the same thing in the same sense" as defined in section 13 of the Indian Contract Act. There is no definition of "consent" in the Sale of Goods Act itself, but section 2(15) of the Act definitely lays down that the expressions used and not defined in the Act, but which are defined in the Indian Contract Act, shall have the same meaning as has been assigned to them in the latter Act. Section 14 of the Contract Act defines the expression "free consent" and a consent is free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake. A consent induced by false representation may not be free, but it can nevertheless be real, and ordinarily the effect of fraud or misrepresentation is to render a transaction voidable only and not void. If an innocent purchaser or pledgee obtains goods from the person in possession thereof, whose possessory right is not feasible on the ground of fraud but had not actually been defeated at the time when the transaction took place, there is no reason why the rights of such innocent purchaser or pledgee should not be protected. The right in the possessor or bailee in such circumstances is determinable no doubt but so long as it is not determined it is sufficient to enable him to create title in favour of an innocent transferee for value without notice. This proposition is well recognised in English law and seems to us to be well founded on principle. In *Cahn v. Pockett's Channel Steam Packet Company* ([1899] 1 Q.B. 643 at 659.), Collins L.J. made the following oft-quoted observation :-

"However fraudulent a person in actual custody may have been, in obtaining the possession, provided it does not amount to larceny by trick and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can, by his disposition, give a good title to the purchaser."

The opinion of the learned Judge in regard to the so-called exception where there is a "larceny by trick" has been the subject of much comment both favorable and adverse in later cases as we shall see presently; but the main proposition enunciated by him has never been disputed (Vide the cases referred to by Scrutton L.J. in *Folkes v. King* [1923] 1 K.B. 282 at 301.). The law on this point has been thus summed up by Denning L.J. in *Pearson v. Rose* ([1950] 2 All E.R. 1027 at 1032.) :

"The effect of fraud..... is as a rule only to make the transaction voidable and not void, and if, therefore, an innocent purchaser has bought the goods before the transaction is avoided the true owner cannot claim them back. For instance, if a mercantile agent should induce the owner to pass the property to him by some false pretence as by giving him a worthless cheque, or should induce the owner to entrust the property to him for display purposes, by falsely pretending that he was in a large way of business when he was not, then the owner cannot claim the goods back from an innocent purchaser who has bought them in good faith from the mercantile agent..... The consent may have been obtained by fraud but, until avoided, it is a consent which enables the Factors Act to operate."

Thus obtaining possession of goods by false pretences does not exclude the operation of the Factors Act in England and in our opinion it does not exclude the operation of the section 30(2) of the Sale of Goods Act in India.

The position, however, is entirely different if the fraud committed is of such a character as would prevent there being consent at all on the part of the owner to give possession of the goods to a particular person. Thus A might obtain possession of goods from the owner by falsely representing himself to be B. In such cases the owner can never have consented to the possession of goods by A; the so-called consent being not a real consent is a totally void thing in law. In *Lake v. Simmons* ([1927] A.C. 487, 500.) Lord Haldane made the following observations while dealing with a similar point :

"The appellant thought that he was dealing with a different person, the wife of Van der Borgh, and it was on that footing alone that he parted with goods. He never intended to contract with the woman in question. It was by deliberate fraud and trick that she got possession. There was not the agreement of her mind with that of the seller that was required in order to establish any contractual right at all. The latter was entirely deceived as to the identity of the person with whom he was transacting. In circumstances such as these, I think that there was no consensus *as idem*."

The position, therefore, is that when the transfer of possession is voidable merely by reason of its being induced by fraud, which can be rescinded at the option of the owner, the consent which followed false representation is a sufficient consent within the meaning of section 30(2) of the Sale of Goods Act. But where the fraud induced an error regarding the identity of the person to whom or the property in respect of which possession was given, the whole thing is void and there is no consent in the sense of an agreement of two persons on the same thing in the same sense.

The other question that requires consideration is, whether it would make any difference in the application of the principles stated above if the fraud or deception, practiced by a person in obtaining possession of goods from the owner, is of such a character as to make him guilty of a criminal offence ? Having regard to what has been said above, this question should not present any difficulty, had it not been for the fact that an amount of complexity has been introduced into the subject by reason of certain technical rules of the English criminal law. It is to be remembered that what section 30(2) of the Sale of Goods Act contemplate is that the buyer, to whom the property in the goods sold has not passed as yet, must obtain possession of the goods with the consent of the seller before he can give a title to an innocent purchaser or pledgee. There can be no dispute that to establish consent of the owner of the goods, it is his state of mind that is the only material thing for consideration and not that of the receiver of the goods. Even if the owner was induced to part with the goods by fraudulent misrepresentation he must yet be held to have consented to give possession; and the fact that the receiver had a dishonest intention or a preconcerted design to steal or misappropriate the goods and actually misappropriated them, may make him liable for criminal offence, but the consent of the owner actually given cannot be annulled thereby. In order that a fraudulent receiver of goods must be punished criminally, the material thing is his dishonest intention; but as was said by Bankes L.J. in *Folkes v. King* ([1923] 1 K.B. 282 at 297.), that is altogether immaterial for the purpose of determining whether there was consent on the part of the owner of the goods under the Factors Act. "The two considerations," observed the learned Judge, "should be kept entirely distinct. To allow the one to be defeated by consideration of the other is in my opinion to sweep away a great part of the protection which the Factors Act was intended to provide." The same ratio, in our opinion, applies in regard to the provisions of the Sale of Goods

Act.

As has been said already, obtaining of goods by false pretences does not negative consent of the owner of the goods for purposes of the English Factors Act. Even larceny by a bailee does not exclude consent according to the English decisions. This means that if the owner allows an agent to have his goods or hire or for repair and the agent later on makes up his mind to steal or misappropriate them and sell them to another, the agent may be guilty of larceny as bailee but the owner's consent to his possession could not be affected thereby. But curiously enough in English law a difference is made between larceny by bailee and larceny by trick; and if in the illustration given above the agent instead of making up his mind subsequently to steal the goods had that dishonest intention at the very beginning when he got possession, he is guilty of "larceny by trick" and the possession in law is deemed to remain with the owner and he is regarded as 'taking' without the owner's consent. This apparently involves a legal fiction, for although the goods are actually delivered over by the owner to the accused person, yet because of the trick committed by the latter the owner is still supposed to continue in possession of the goods and the accused is held guilty of larceny for taking possession of the goods against the will of the owner. Ordinarily, the offence of larceny by trick, according to the English law, can be committed in two ways : first, where the owner of goods, being induced thereto by trick, voluntarily parts with the possession of the goods in favour of the accused but does not intend to pass property therein and the recipient has the *animus furandi*. Secondly, when the accused contrives to get possession of goods by representing himself to be some other person or by deceiving the owner into thinking that he was delivering different goods (Vide *Whitehorn v. Davison* [1911] 1 K.B. 463, 479.). In the second class of cases, there is no real consent on the part of the owner and when a larceny by trick of this type is committed, it is well settled in England that the operation of the Factors Act would be excluded. The position under the Indian law is the same in accordance with the principles explained above.

With regard to the first category of cases, however, the decisions of the English courts are not at all uniform. As has been said already, *Collins J. in Cahn v. Pockett's Bristol Channel etc.* ([1899] 1 Q.B. 643 at 659.) made the observation that "however fraudulent a person in actual custody may have been in obtaining possession, provided it did not amount to larceny by trick..... he can by his disposition give a good title." The observation as regards the exception in case of larceny by trick, though it could not rank higher than an obiter, was accepted as good law by the Court of Appeal in England in *Oppenheimer v. Frazer* ([1907] 2 K.B. 50.). On the other hand, it was held by *Bankes L.J. and Scrutton L.J. in Folkes v. King* ([1923] 1 K.B. 282.) that when consent was in fact given by the owner of the goods, it was immaterial that the receiver was guilty of larceny by trick, and this view was approved of by the majority of the Court of Appeal in *Lake v. Simmons* ([1926] 2 K.B. 51.), though *Atkin L.J.* delivered a dissenting judgment. The decision in *Lake v. Simmons* ([1926] 2 K.B. 51.) was reversed by the House of Lords ([1927] A.C. 487.) but their Lordships proceeded not to any technical doctrine of criminal law but on the broad ground which we have already discussed that there was a mistake fatal to there being a consenting mind at all. The view taken in *Folkes v. King* ([1923] 1 K.B. 282.) has been approved of in the recent decision of *Pearson v. Rose* ([1950] 2 All. E.R. 1027.). Thus, to quote the language of Lord *Sumner*, "there is a signal and indecisive conflict of authoritative opinion on this point" (Vide *Lake v. Simmons* [1927] A.C. 487 at 510.). In our opinion, the view taken in *Folkes v. King* ([1923] 1 K.B. 282.) is the proper view to take; and if, as was said by *Scrutton L.J.* In that case, the Parliament could not possibly have intended to apply the artificial distinctions of criminal law to a commercial transaction governed by the Factors Act, there is still less justification for importing a highly technical rule of England criminal law which had its origin in a legal fiction devised by English Judges to punish a thief, who would otherwise have escaped conviction, into the provisions of the Indian Sale of Goods Act. Whether there is

consent or not has to be proved as a fact in accordance with the principles of the law of contract and when it is proved to exist, its existence cannot be nullified by application of any rule of criminal law.

It is in the light of these principles that we would proceed now to examine the facts of this case. The whole question is, whether Mukherjee got possession of the shares with the consent of the seller, and it is not disputed that the consent of the defendant's clerk, who was acting as the agent of the owner, would be as effective as the consent of the owner himself.

As has been said already, Bhuiya sent the shares to the defendant bank on the 14th of February, 1946. The letter written by him to the defendant on that date concludes as follows :

"I shall be highly obliged if you kindly realise the sum of Rs. 38,562-8-0 as per the enclosed bill from Mr. D. N. Mukherjee and deliver the shares to him and credit the realised sum to my account No. 1 and oblige."

On the next day, that is to say on the 15th, Bhuiya wrote to Mukherjee informing him that he had deposited in the Barabazar branch of the United Industrial Bank, 300 Iron and 500 Steel Corporation shares and Mukherjee was requested to take delivery of the shares against payment immediately. On the 18th of February following, Nilkrishna Paul, an old employee in the cash department of the defendant bank, was directed by the head cashier to see Mukherjee at his office for the purpose of collecting the money from him and delivering over the shares. Sachindra Sen, an officer of the defendant under whose advice Paul was sent to Mukherjee, says in his deposition, that he definitely instructed Paul not to deliver the shares unless he received payment. As regards the mode of payment, Sen says that it was already arranged between him and Mukherjee that instead of paying the money in cash, he would give a pay order of the Punjab National Bank, where he had an account, upon the defendant bank. Sen told Paul to examine the pay order carefully and to part with the shares only if he was satisfied about it; otherwise, he should come back with the shares to the office. Paul, who is the principal witness on behalf of the defendant, says in his deposition that the instruction which he received was to deliver the shares after he obtained the pay order. Paul saw Mukherjee at his office chamber at about 11 a.m., on the 18th and on his telling Mukherjee that he had come from the United Industrial Bank to deliver over the shares, Mukherjee asked him to take his seat. Mukherjee then asked for the shares. Paul told him that he could not deliver the shares unless he was given the pay order. Mukherjee then said "I just want to have a look at the shares and the papers only to see whether they are all right or not." Upon this, Paul placed the shares on the table. What happened after words is thus narrated by him in his deposition :

"Then he was looking at the shares one after another. When Mukherjee was about to leave the chamber, I told him not to go away but to give me the pay order. He told me 'I am going out, to get the pay order, it is ready, you take your seat, I am coming.' Then he went out of the chamber."

It is quite clear that when Paul placed the share certificates upon the table and allowed Mukherjee to scrutinise them, he did not part with the possession of or control over the shares. It is true that Mukherjee handled the papers, but he did so in the presence of Paul who was sitting by his side in front of the same table. At the most Mukherjee could be said to have the barest physical custody for the purpose of examining the papers. When Mukherjee went out of the room with the shares in his hand, he undoubtedly got possession of the shares; but on the evidence on the record, we do not think it possible to hold that he got possession with the consent of Paul. The evidence shows that

Paul actually protested and objected to his going away with the shares without making any payment. It is true that Mukherjee told Paul that he was going out for getting the pay order, and would be coming back immediately; but we cannot agree with Mr. Mullick that Paul consented to Mukherjee's taking away the papers, relying on the latter's promise to come back with the pay order. Mukherjee gave Paul no opportunity whatsoever to express his assent or dissent in this matter. In spite of Paul's protest, he bolted away with the papers asking Paul to wait. Paul says in his deposition that he waited for 2 or 3 minutes, and when Mukherjee did not come back, he became anxious and went out of the chamber towards the counter where he found an old gentleman sitting. The gentleman told him that Mukherjee was nowhere in the office. This shows that Paul did not really rely upon the assurance of Mukherjee and did not allow Mukherjee to have possession of the shares upon that assurance. It was against his express desire that Mukherjee took the shares and left the chamber with them and he had to wait for a minute or two as he could not think of any other alternative open to him at that juncture. Taking the evidence as a whole, we think that the decision of the appellate bench of the High Court is correct and that on the facts and circumstances of this case, it cannot be held that Mukherjee got possession of the shares with the consent of Paul. The result, therefore, is that the appeal is dismissed and the judgment of the appeal court is affirmed. As both the plaintiff and the defendant were innocent persons, who suffered on account of the fraud of a third party, we direct that the parties shall bear their own costs in all the courts.

Appeal dismissed.

Agent for the appellant : Sukumar Ghose.

Agent for the respondent : B. N. Ghose.

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