

# ALLAHABAD HIGH COURT

Durga Shah Mohan Lal Bankers

Vs.

Governor General in Council

Second Appeal No. 2226 of 1944

(Mushtaq Ahmad and Desai, JJ.)

02.03.1950

## JUDGMENT

**Desai, J.**

1. This is an appeal by a Plaintiff Whose suit for the recovery of money has been dismissed by the Dist. J. of Kumaun on appeal. It was decreed by the trial Court, but the learned Dist. J. reversed the decree.

2. There is no dispute about the facts which are as under. The Plaintiff appellant, Messrs. Durga Sah Mohan Lal Sah, is a firm of bankers at Ranikhet. In 1940 'B' Company of the Queen's Royal Regiment, under the command of Major Phillips, was stationed at Dulikhet. On 31-5-1940 Lt. Lockyer of the Regiment in his official capacity drew a cheque for Rs. 716-13-0 on the Imperial Bank of India, Allahabad branch, payable to Major Phillips also in his official capacity, or bearer, and crossed it generally. He did not mark it as "not negotiable." He handed over the cheque to Major Phillips who endorsed it in blank on the back and gave it to Sgt. Pittsford with direction to take it to Lt. Mausel to pay it into the local treasury. Sgt. Pettiford, contrary to the direction and apparently dishonestly, took it on 1-7-1940 to the Plaintiff and asked it to cash it for him. The Plaintiff at once paid him the amount of Rs. 716-13-0 and he went away. He disappeared and when Major Phillips knew about his disappearance with the cheque, he instructed the drawee bank at Allahabad not to honour the cheque if it was presented to it. The Plaintiff handed over the cheque to the Allahabad Bank at Naini Tal for collecting the money. This bank sent it to the Imperial Bank at Allahabad which refused payment in accordance with the instructions of Major Phillips. The Plaintiff communicated the fact of the refusal to Major Phillips and demanded the payment of the cheque by him. Major Phillips disowned all liability on the ground that as he was acting in official capacity he was not personally liable. The Plaintiff addressed the Govt., but in vain, and after the necessary formalities instituted the suit which has given rise to this appeal against the Governor-General, Major Phillips and Lt. Lockyer.

3. The suit was jointly defended by the Defendants Their sole contention was that the Plaintiff was not justified in paying the cheque in cash to Sgt. Pettiford when it was a crossed cheque. Their contention was and still is, that the Plaintiff should have paid it through a banker and not direct, and that the cheque was handed over to Sgt. Pettiford not to be cashed but to be paid into the treasury through Lt. Mausel. The trial Ct. took the view that the cheque was negotiable despite the crossing and was negotiated by Sgt. Petriford to the Plaintiff which acted in good faith and without negligence, that it became holder in due course of the cheque and that the Defendants were liable to pay the money to it. The learned Dist. J., on appeal, held that the Plaintiff was not justified in paying the amount of the crossed cheque in cash to Sgt. Pettiford and did not act without negligence.

4. A cheque is under the law a negotiable instrument. Its negotiability can be destroyed only if it is marked as "not negotiable" on its face; it is not destroyed by its simply being crossed whether generally or specially. The only effect of crossing a cheque is, as stated in Section 126, Negotiable Instruments Act, that the drawee bank must not pay it otherwise than to any banker if it is crossed generally, or to the particular banker if it is crossed specially. There is no other effect of the crossing. In *Carlton v. Ireland*<sup>1</sup>, Coleridge, J., stated at p. 114 :

"It may be that the effect of the crossing is to require caution on the part of the person taking it, and to throw upon him the obligation of showing that he had taken it bona fide, and had given value for it; but it cannot be carried further without interfering with the negotiability of the instrument."

Lord Cairns, C., said in *Smith v. The Union Bank of London*<sup>2</sup>, that,

"Whatever may have been the effect of a crossing, the negotiability of the cheque was not thereby restrained."

5. Major Phillips gave the cheque to Sgt. Pettiford to take it to Lt. Mausel, but Sgt. Pettiford took it to the Plaintiff and asked it to cash it for him. The Plaintiff agreed and immediately paid the money in cash. As the cheque was payable to bearer and as the payee had already endorsed it in blank, any bearer of it could collect its money through a banker. The fact that Sgt. Pettiford's name was not endorsed on the cheque, did not prevent the Plaintiff cashing it for him. The transaction between Sgt. Pettiford and the bank was simply that of negotiation of the cheque. Sgt. Pettiford transferred the cheque to the Plaintiff and the Plaintiff bought it from him. Since the Plaintiff was not drawee of the bank, it cannot be said that it honoured the cheque. The learned Dist. J., fell into the error of confusing the Plaintiff with a drawee bank and thought that the Plaintiff was not entitled to pay the money in cash at its counter. The Plaintiff was a banker but was that banker through whom the drawee bank could pay the money to the payee or bearer; it was not the banker who was bound by Section 126. The Imperial Bank at Allahabad could not

pay the money in cash, but any other banker could pay the money in cash to its customer and then realize the money from the drawee bank. The learned Dist. J., does not appear to have stuck to the view that the Plaintiff was not entitled to pay the money in cash. Towards the end of the judgment he observed :

"If Major Phillips had presented this cheque and obtained payment, there is no doubt that he would have been liable to the Plaintiff but the fact that payment was made to an unauthorized person who was not the drawee does not, I think, help the

<sup>1</sup>(1856) 25 LJQB 113

<sup>2</sup>(1875) 1 QBD 31 at p. 34

Plaintiff."

This suggests that he was of the opinion that inspite of the crossing the cheque could be paid in cash at the counter. Why it could not be so paid here was, according to him, that the recipient was not the payee but his agent. This distinction has no basis in law; the question whether a crossed cheque can be paid in cash or not does not depend upon whether the recipient is the payee or his agent. In case of a cheque payable to bearer there is hardly any distinction between the payee and a person who presents it for payment. Every holder of it is entitled to the payment at the drawee bank. In the case of Carlon the facts were very similar to those in the case at hand X drew a crossed bearer cheque and gave it to C who crossed it in favor of D bank and gave it to his clerk L to take it to D. Instead of doing so, L gave it to I who got it cashed by his banker and handed over the money to L who decamped with it. C sued I to recover the money and his suit was dismissed on the ground that I was entitled as holder in due course to retain the money received by him through his banker from the drawee bank. Coleridge, J., distinguished the case from *Bellamy v. Majoribanks*<sup>3</sup>, where the question as to the validity of a crossed cheque arose between a customer and his banker and stated, at p. 114 :

"Here the question is, whether the party taking the cheque bona fide and for value is not the lawful holder and entitled afterwards to receive the proceeds of the cheque; and by admitting the negotiability of the cheque, though crossed, it seems to me all objection is got rid of."

The facts in Smith's case also were similar. B drew a cheque on U bank and gave it to S. S endorsed the cheque in blank and crossed it in the name of his banker L. It was stolen from his possession by a thief who sold it for full value to C. C. paid it into his bank which presented it to U bank for payment. U paid the money to the banker. Subsequently S sued U for the money and he was held to be not entitled to recover anything. Lord Cairns, C., stated the effect of the crossing to be this :

"It imposes caution, at least, on the bankers. But, further, by its express words it alters the mandate, and the customer, the drawer, is entitled to object to being charged with it if paid contrary to his altered direction." (P. 35).

The cheque was crossed by S and not R who drew it and his Lordship distinguished between their rights in these words :

"He" '(the Plaintiff S)' cannot maintain an action on the ground that the debts have paid the cheque contrary to the statute, because, though an action lies by the person grieved where the provisions of a statute have been infringed, yet that is only when those provisions are (or his direct benefit, and he has sustained loss by their infringement. Here the prohibition of payment except to a banker is for the direct benefit of the drawer."

*M'lean v. The Clydesdale Banking Co*<sup>4</sup>, is the highest authority for the proposition that a banker other than the drawee bank cannot be blamed for paying a crossed cheque in cash. M'lean drew a cheque payable to T or order on S bank and

<sup>3</sup>(1852) 7 Ex. 389

<sup>4</sup>(1883) 9 AC 95

crossed it in blank, T endorsed it and gave it to his banker C. C at once credited the amount of the cheque in the account of T which had already been overdrawn. Subsequently M stopped payment by S and when C presented the cheque to S for payment, S refused and the House of Lords decided that C being the onerous holder of the cheque was entitled to recover its money from M'lean. C had paid the cheque in cash to its customer T even though it was a crossed cheque and yet he was held entitled to recover its value from the drawer when the drawee bank refused to honour it. As far as the question under discussion is concerned, there is nothing to distinguish the case at hand from M'lean's case. The Plaintiff therefore, was not disentitled merely on account of its having paid in cash.

6. Reference was made to Section 129 which makes a banker, paying a crossed cheque in contravention of the mandate involved in the crossing, liable to the true owner of the cheque. This makes the drawee bank responsible. It does not make the banker through whom the crossed cheque is paid responsible. The liability of the banker through whom the crossed cheque is paid is described in Section 131 to which I shall refer in due course. There are two bankers referred to in Section 129 and the bankers referred to in the opening words is the drawee bank. A cheque payable to bearer is negotiable by delivery under Sections 46 and 47. Sgt. Pettiford delivered the cheque to the Plaintiff and this completed the negotiation. It is immaterial if he had no authority to negotiate the cheque or he did so in contravention of the direction given to him by Major Phillips. The Plaintiff acted bona fide and paid the full valuable consideration for it. It had no knowledge of the direction given by Major Phillips to Sgt. Pettiford. It used to deal with military officers and cash their cheques. There was nothing suspicious on the face of the cheque and as it was a bearer cheque, the Plaintiff could have paid it to anybody who brought it to it. The learned Dist. J. has relied upon the fact that the Plaintiff did not know Sgt. Pettiford and had no instructions from Major Phillips to cash the cheque. The plttf. did not stand in need of any instructions in order to cash a bearer cheque and cannot be said to have acted dishonestly or even negligently by making the payment to a man not known to it. Pollock, C.B. stated in *Barber v. Richards*<sup>5</sup>. a full reference to which would be made later, that "a person who takes a bill endorsed

generally is not bound to inquire whether the bill has been properly transferred or not." The Plaintiff knew Major Phillips and knew that Sgt. Pettiford had gone to it from Major Phillips. Through the negotiation the property in the cheque passed to the pltf. which became entitled to sue upon it. Whether Sgt. Pettiford was a holder within, the meaning of Section 8 or not, the Plaintiff believed him to be a holder. He was the bearer of the cheque and as such, was thought by the Plaintiff to be entitled to its possession in his own name and to receive or recover its amount. According to the Defendants he was only their servant or agent, but the Plaintiff did not know this and had no reason to know this. But whatever might have been the status of Sgt. Pettiford under the Act, the status of the Plaintiff became that of a holder in due course as defined in Section 9. A cheque becomes payable when it is presented at the drawee bank. Here it had not been presented to the drawee bank before it was negotiated to the Plaintiff and the amount mentioned in it had not become payable. The Plaintiff had no sufficient cause to believe that any defect existed in Sgt. Pettiford's title. On the basis of *Jai Narain v. Makbub Baksh*<sup>6</sup>, it was pleaded on behalf of the Defendants that there is a distinction between a defect in title and no title such as where an endorsement is forged. In *Vagliano*

<sup>5</sup> (1851) 86 BR 190,     <sup>7</sup> (1889) 23 QBD 243

<sup>6</sup> 28 All 428

*Brothers v. Bank of England*<sup>7</sup>, Lord Esher, M.R. stated at p. 248, that :

"The Law merchant never recognized a forger of another man's name as a real merchantile drawer. There is in this case no real payee; the forging drawer cannot be recognized as the payee."

It cannot be said that Sgt. Pittsford had no title at all and he cannot be compared with a forger or a thief. He might have acted in fraud of his principal, but he had title to be in possession of the cheque. It is stated in *Vagliano's* case itself by Bowen, L.J. at p. 225 that "if the bill is originally payable to bearer it is an authority to pay the bill to the person who is the holder." Thus his possession itself was some title. He had no title to negotiate it and this absence was nothing but a defect in his title. There was no greater defect in his title than in the title of the clerk L in the case of *Garlon* or of the thief in the case of *Smith* or of the customer of S in *Raphael v. Bank of England*<sup>8</sup>, In the last mentioned case 8, who was a money-lender received in the course of his business from his customer a stolen bank-note. The fact that certain bank notes were stolen was advertised and notices containing the numbers of the stolen notes were distributed among money-lenders. S had got a notice and kept it on file. When he received the note from his customer, he did not look into the file to compare the numbers but accepted it. He could not get the money from the bank and sued it. His suit was decreed notwithstanding the fact that the note was a stolen one. I know of another case, *Barber v. Richards*<sup>9</sup>, where the facts were quite similar. Edwarda drew a bill upon the deft, who accepted it and then Edwards endorsed his name on the back of the bill and delivered it to Brown for the purpose of getting it discounted. Brown, instead

of getting it discounted, pledged it for value with Tingey. Tingey sued for the money and his suit was decreed. Parke, B., observed at p. 192 :

"Ever since the case of *Collins v. Martin*<sup>10</sup>, the rule of law has been that, when a bill is payable to bearer, any person who is the holder for value may sue upon it, whether the party from whom he has taken it had a title or not. Here Edwards put his name on the back of the bill, and delivered it to his agent Brown, who disobeyed his order to get it discounted; but it cannot therefore be said that the property did not pass to the person to whom Brown delivered it for value. There was no proof of any fraud on the part of Tingey, and he must be considered as a bona fide holder." Pollock, C.B., observed at p. 193 :

"In this case, as between Edwards and Tingey, there may have been no intention to give the latter a title; but there was an intention to give a title to the person to whom Brown might deliver it, and he delivered it to Tingey."

In *Lee v. Newsham*<sup>11</sup>, a person who got a stolen cheque from a customer without criminal knowledge was given a decree against the drawer when the drawee bank transferee had dishonoured the cheque. In *Ram Sarup v. Hardeo Prasad*<sup>12</sup>, Hardeo Prasad was held to be not a holder in due course of a cheque because the amount mentioned in it had become payable before he acquired property in it and there

<sup>8</sup>(1855) 25 LJ C.P. 33

<sup>10</sup>(1797) 4 RR 752 : (1 Bos. and P. 648) <sup>12</sup>50 All 309

<sup>9</sup>(1851) 86 RR 190

<sup>11</sup>(1823) 25 RR 788,

was sufficient cause for him to know that it was a stale cheque. The cheque was drawn on June 5, whereas he claimed to have acquired property in it on September 28. If a banker receives a crossed cheque from his customer in order to collect the money, he acts as a banker and agent of the customer, and not as holder in due course. He does not acquire any property in the cheque. But if the cheque is negotiated to him and the property in it passes to him, he becomes holder in due course and ceases to be the customer's banker or agent as regards that transaction. The distinction between a banker who merely acts as an agent of his customer and a banker who becomes a holder in due course must be kept in mind because the rights and liabilities of the banker in the two cases are different. If he acts merely as an agent to collect the money, he has no cause of action against the drawee bank if it refuses payment; the cause of action then remains in the customer. If he is the holder, he himself becomes entitled to sue. Section 131 protects a banker who in good faith and without negligence receives payment for a customer of a crossed cheque when the title to the cheque proves defective. This provision is similar to that of Section 82, English Bills of Exchange Act of 1882. *Capital and Counties Bank Ltd. v. Gordon*<sup>13</sup>, is a case governed by Section 82, Bill of Exchange Act. Gordon was a holder of a crossed cheque payable to him or order. His servant J forged endorsement on it and gave it to his banker C.C. at once credited the amount to his account and J even drew money from the account. C had no suspicion of the forgery and obtained payment from Gordon's bank. Subsequently, Gordon sued C for the money and the house of Lords gave him a decree, because C was held not entitled to the protection of Section 82, Bill of Exchange Act inasmuch as he did not act as J's banker or agent.

The law in India is slightly different; a banker is deemed to receive payment for a customer even though he credits his account with the amount before receiving payment. Further, the Plaintiff is a banker by profession but did not stand in the relationship of a banker of Sgt. Pettiford who had no account with it. It was just an accident that it happened to be a banker by profession. Sgt. Pettiford could have got the money from any person whether a banker or not and the Plaintiff merely on account of its following the profession of a banker, cannot be put in a worse position than any other person who could have paid the money in cash.

7. The provision that the person must have become possessor of a cheque "without having sufficient cause to believe" is more favourable to the person who claims to have become holder in due course than the words "acting bona fide." His claim would be defeated only if it is found that there was sufficient cause for him to believe that a defect existed. If he fails to prove bona fides or absence of negligence, it would not negative his claim. There must be evidence of positive circumstances on account of which he ought to have believed that some defect existed. In the present case there was no cause whatsoever for the Plaintiff's believing that any defect existed in Sgt. Pettiford's title. The learned Dist. J. was not right in attributing mala fides to the Plaintiff on the ground of its so-called negligence in paying cash to a man unknown to it and without any written authority from Major Phillips. I have found that this act did not amount to negligence, but even if it did it does not matter at all. Lord Denman, C.J., in *Goodman v. Harvey*<sup>14</sup>, stated :

"Gross negligence only would not be a sufficient answer, where the party has given consideration for the bill."

<sup>13</sup>(1903) AC 240

<sup>14</sup>(1836) 4 A and E 870 at p. 876

The general rule, both at law and in equity, is that no person can acquire title, either to a chose in action or any other property from one who has himself no title to it; but a negotiable cheque is an instrument which

"falls within that description of property to which a good title may be acquired by a party who takes it bona fide for value notwithstanding any defect of title in the party from whom it is so taken." (See *Crouch v. The Credit Fonder Co. of England Ltd*<sup>15</sup>.,

Pollock writes in his "Principles of Contract," Edn 10 at p. 225 :

"The narrow doctrine which for a time prevailed, requiring a certain measure of caution, on the part of the holder, is now completely exploded. Nothing short of actual knowledge of the fact affecting his transferor's title or wilful and, therefore, dishonest inquiry will defeat the holder's title."

In Smith's case, Lord Cairns, C., argued :

"If the statute had meant to prevent any person becoming lawful holder of a crossed cheque unless he derived title through lawful holders, this ought to have been, and might easily have been, expressed. If it meant that a man might be a lawful holder, but in no way entitled to the money- a not very intelligible proposition - this ought to have been expressed."

There is no such express provision in the Act and the Plaintiff must be held to be a holder in due course. Section 30 makes a drawer of a cheque liable, in case of dishonor by the drawee, to compensate the holder. Section 35 makes every endorser and deliverer of a cheque liable to a subsequent holder in case of dishonor by the drawee. Section 36 makes every prior party to a negotiable instrument liable thereon to a holder in due course until the instrument is duly satisfied. A maker or endorser of a cheque payable to bearer is discharged from liability when he makes payment in due course. When the drawee bank refuses to pay, it is the drawer and every other prior party that is responsible to satisfy the holder's claim. Therefore, Major Phillips and Lt. Lockyer, the endorser and the drawer respectively of the cheque, and the Govt. as whose agents they have acted, are all liable to the Plaintiff.

8. I would, therefore, hold that the appeal must be allowed, the decree of the learned Dist. J. should be set aside and that of the learned Addl. Civil Judge should be restored with costs of both appellate Cts.

**Mushtaq Ahmad, J.**

9. I agree in the order proposed.  
Appeal allowed.