

Bombay High Court

Jagjivandas Jamnadas

Vs

The Nagar Central Bank Limited

(Kajiji, J.)

JUDGMENT

Kajiji, J.

1. The plaintiff carries on business as a sub agent of the firm of Tarachand Ghanshamdas and sells kerosene oil of the Burma Oil Company in the district of Ahmednagar. The defendants are bankers doing business at Ahmednagar. It appears that the plaintiff had dealings for the last twenty years with the firm of Tarachand Ghanshamdas and in the course of such business the plaintiff used to send from time to time either hundis or cheques by ordinary post to Tarachand Ghanshamdas. On October 24, 1923, the plaintiff took from the defendants a cheque for Rs. 3000 payable to themselves or order, on the Bombay Provincial Co-operative Bank, and the cheque was not crossed at the plaintiff's request. The plaintiff indorsed the cheque in favour of Tarachand Ghanshamdas Or order, and it was sent, according to the evidence of the plaintiff, by ordinary post with a letter dated October 24, 1923, along with a hundi for Rs. 600 to Tarachand Ghanshamdas. The letter with the enclosures, namely, the cheque and the hundi, did not reach Tarachand Ghanshamdas; it ought to have ordinarily reached on October 25, but on October 25, some person presented the cheque duly indorsed In the ordinary course of business to the Bombay Provincial Co-operative Bank in Bombay, who in due course made the payment of Rs. 3000. It appears that the plaintiff, as he did not get an acknowledgment of receipt of the cheque and hundi, sent reminders and the defendants declining to pay Rs. 3000, this suit is filed to recover from the defendants the sum of Rs. 3000, the amount of the cheque.

2. It is urged on behalf of the defendants that as the plaintiff sent the cheque in a letter by ordinary post without the cheque being crossed he was guilty of gross and culpable negligence and as the cheque was endorsed in favour of Tarachand Ghanaham-das the plaintiff had no interest left in him in the cheque and therefore this suit is not maintainable by the plaintiff and ought to have been filed by the firm of Tarachand Ghanshamdas. But, in my opinion, there is no delivery within the meaning of Section 46 of the Negotiable Instruments Act simply because the cheque is sent by post: and therefore on the issue whether the suit is maintainable or not, I must find in favour of the plaintiff and hold that there was no delivery within the meaning of Section 46. It must also be mentioned that the firm of Tarachand Ghanshamdas has not given credit to the

plaintiff for this amount and the practice has been to give credit only after the cheque is cashed or the moneys of the hundi are recovered; and therefore the firm of Tarachand Ghanshamdas were perfectly justified in not giving credit to the plaintiff for the amount, I also hold that the plaintiff was not guilty of gross and culpable negligence, as alleged by the defendants, simply because he sent the cheque by ordinary post and without it being crossed. There is not the slightest doubt that there was no express or implied request from the firm of Tarachand Ghanshamdas to the plaintiff to send cheques or hundis by ordinary post. Because the plaintiff for the last twenty years was in the habit of sending cheques and hundis by post, it cannot be inferred that there was an implied request by Tarachand Ghanshamdas or that they approved of the mode of sending cheques or hundis by ordinary post, It is clear from the decision in *Pennington v. Crosaley and Son*¹ that from the mere fact that cheques were sent from time to time by post in the ordinary course of business it cannot be inferred that there was any implied request from the firm of Tarachand Ghanshamdas to the plaintiff to send cheques by post.

3. The real defence to this suit is that under Section 85 of the Negotiable Instruments Act protection is given to the drawee if a cheque payable to order purports to be indorsed by or on behalf of the payee and if drawee makes the payment in due course. Section 85 is in these terms:- " Where a cheque payable to order purports to be indorsed by or on behalf of the payee the drawee is discharged by payment in due course." The cheque in suit (Ex. A) was made payable by the defendants to the plaintiff Jugjiwandas Jamnadas or order. Jugjiwandas Jamnadas endorsed it before sending the cheque by post to Tarachand Ghanshamdas as follows: "Please pay to Tarachand Ghanshamdas or order " and signed his name. It is not disputed that the indorsement of the payee, namely, Jugjiwandas Jamnadas, is genuine. If the cheque (Ex. A) had not been indorsed in favour of Tarachand Ghanshamdas and had only borne the indorsement of the payee, whether genuine or not, there is not the slightest doubt that Section 85 of the Negotiable Instruments Act gave complete protection to the drawee. But it is urged on behalf of the plaintiff that as in this case the cheque was indorsed in favour of Tarachand Ghanshamdas Section 85 gave no protection to the drawee or drawer. But it is contended on behalf of the defendants that once the payee signs his name and makes it payable to some other person, that other person becomes the payee within the meaning of Section 85. In my opinion that contention is absolutely untenable, for s. 7 of the Act itself defines payee as the person named in the instrument to whom or to whose order the money is by the instrument directed to be paid, so in Exhibit A the payee is Jugjiwandas Jamnadas and therefore if Jugjiwandas Jamnadas endorsed it in favour of some body else, and in this case to Tarachand Ghanshamdas, then that person cannot be the payee within the meaning of this definition. Further the word ' indorsee' is also defined by Section 16 and it is as follows :-" If the indorser signs his name in blank and if he adds a direction to pay the amount mentioned in the instrument to or to the order of a specified person, the person so specified is called the 'indorsee' of the instrument." Therefore Tarachand Ghanshamdas is the indorsee and not the payee and the first contention of the plaintiff that the subsequent indorsee becomes the payee within the meaning of Section 85 of the Negotiable Instruments Act is untenable,

4. But it is urged, on behalf of the plaintiff, that by Act V of 1914, Section 16 (2) of the Negotiable Instruments Act has been amended by adding the words : " The provisions of this Act relating to a payee shall apply with the necessary modifications to an indorsee," and therefore wherever the word " payee " occurs in the Act, the word ' indorsee ' must also be included; and Section 85 would therefore read : " Where a cheque payable to order purports to be indorsed by or on behalf of the payee (i.e. indorsee also) the drawee is discharged by payment in due course," If that contention is correct, that is a complete answer to the suit. But it is urged on behalf of the plaintiff that Section 16 under the amending Act V of 1914 purported only to make the amendments to two sections, viz., ss. 13 and 16, for as the preamble states there were some doubts as to the validity of making endorsements in negotiable instruments in certain forms and therefore it was thought fit to amend both sections, viz. Sections 13 and 16 only, and to limit its operation to these two sections, and that it was never intended to amend Section 85 by implication. It is further urged on behalf of the plaintiff that if it was intended to make such a change in Section 85 the easiest way would have been by adding the word 'or indorsee' in a.85 or adding a note to s.85. In my opinion the two contentions of the plaintiff, that the words ' this Act' in s.18, Clause 2, do not mean the Negotiable Instruments Act and that Act V of 1914 limited its operation to ss. 13 and 16 only, are both untenable. When a general provision has got to be made it is usual in the Amending Act to say that wherever the provisions relating to a payee occur they shall apply with the necessary modifications to an ' indorsee,' In my opinion, Section 16 (2) of the Negotiable Instruments Act, which is added by Act V of 1914, certainly gives protection under Section 85 to the drawee and in the case of indorsee also if the signature of the indorsee is not genuine. The signature of the indorsee in this case is no doubt a false one. It is true that the evidence of Goculdas Chabildas, a Moonim in the firm of Tarachand Ghanshamdas, does not and cannot carry much weight and is not of much value, for though he has been in their service for a long time, yet as he does not know how to read or write English, his statement that the indorsement of Tarachand Ghanshamdas is not by any authorised munim is useless. One Vadilal Dayabhai, a clerk in the firm of Tarachand Ghanshamdas, has sworn that the endorsed signature " Tarachand Ganshamdas " on the cheque (Exhibit A) is not the genuine signature of Tarachand Ghanshamdas or his son Ramprasad who is also authorised to sign cheques. I, therefore, hold that that signature is not a genuine one. It is urged by the defendants that Ramprasad, who is in Bombay, has not been called, but I do not think his evidence would have carried the case any further. In my opinion Section 85 is a complete answer to the plaintiff even if the signature of the indorsee is not genuine. I cannot understand why if the legislature gave protection to the drawee if the signature of the payee was not genuine, on what principle or for what reason the same protection should not be extended to the indorsee. When the drawee is protected even if the signature of the payee is not genuine, I think the legislature by Act V of 1914 extended that protection to the indorsee and doubts having arisen as to whether Section 85 was applicable or not Section 16 was amended in this manner. It is unnecessary to go into Section 121 of the Negotiable Instruments Act, for even in the case of an indorsee in such a case the protection of estoppel would apply. At one time the learned Counsel for the plaintiff suggested that the

protection under Section 85 was given only to the drawee and not to the drawer. But as far as I am concerned the case of *Sulleman Hussein v. The New Oriental Bank Corporation, Limited*² is binding on me and there Sir Charles Sargent C.J. has held that the protection under Section 85 is not limited to the drawee, but it also applies to the drawer. From the evidence of the pay clerk and the accountant of the third party the amount of the cheque was paid by the third party in due course according to the tenor thereof and in good faith and without negligence. I, therefore, dismiss the suit with costs.

5. Suit is dismissed with costs. Third party discharged. Defendants to pay costs of third party; plaintiffs to pay costs of defendants and such costs of defendants to include the costs which the defendants have to pay to the third party.

Cases Referred.

1(1897) 77 L.T. 43

2(1890) I.L.R. 15 Bom 267