

Thorappa Devanappa Vs. Umedmalji

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Court : Mumbai

Decided On : Apr-04-1923

Reported in : (1923)25BOMLR604

Judge : Mulla, J.

Appeal No. : Small Cause Court Suit No. 145/2139 of 1920

Appellant : Thorappa Devanappa

Respondent : Umedmalji

Judgement :

Mulla, J.

1. His Lordship after setting out the facts of the case went on. The suit came on for hearing before me on March 28, 1923, and again on April 3, 1923, for a few hours on each day. On March 28 counsel for the plaintiffs read out the evidence recorded in the case, Counsel for the second defendant then addressed the Court. Counsel for the first defendant followed him. Though the second defendant filed a long written statement, he did not give any evidence in the case. Such being the case, it is difficult to say under what circumstances the hundi passed into his hands and whether he played any part in this nefarious affair. Nor was any evidence led on behalf of the first defendant. On April 3, at the close of the address of counsel for the first defendant, Mr. Lalji, who had already addressed

the Court on behalf of the second defendant applied that the plaintiff may be recalled to give him an opportunity to cross-examine him as to whether the third defendant had given any authority to the plaintiff, express or implied, to remit the money due by the plaintiff to the third defendant by a hundi. The plaintiff, who resides and carries on business at Hyderabad, was in Bombay on March 29, but he left Bombay after that date, and he was not in Bombay on April 3. I refused the application. The first and second defendants had every opportunity of cross-examining the plaintiff when he gave his evidence before Kanga J. on November 18, 1921. On that day the plaintiff was cross-examined by counsel for the first defendant, but he was not cross-examined at all by counsel for the second defendant.

2. Upon these facts the question arises whether the first and second defendants or either of them is liable to the plaintiff. It is well established that if a party primarily liable on a negotiable instrument pays the amount thereof to a wrong person, who holds it under a forged indorsement, he remains liable to the true owner. The only exception to this is where the payee's indorsement on a cheque payable to order is forged. In such a case it is provided by Section 85 of the Negotiable Instruments Act, 1881, that the drawee is discharged if he pays the amount in due course. No holder of a negotiable instrument, though he may be a holder in due course, can acquire a title to the instrument through a forged indorsement. Section 85 of the Negotiable Instruments Act, which protects a holder in due course where a negotiable instrument has been obtained by means of an offence, does not apply to a case of forgery : *Hunsraj v. Ruttonji* I.L.R. (1899) 24 Bom. 65; *Jai Narain v. Mahabub Bakhsh* I.L.R. (1906) All. 428; and *Banku Behari Sikdar v. Secretary of State for India* I.L.R. (1908) Cal. 239. Such being the case the first defendant is clearly liable to the true owner for the amount of the hundi.

3. The second defendant is also liable to pay the amount of the hundi to the true owner. In the case of goods, if a man takes and sells them when he has no right the owner may waive the tort and recover the proceeds in an action for money had and received. And equally if a person wrongfully convert a bill and receive the amount, the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use. The second defendant who came into

possession of the hundi through forged indorsements took no property in the hundi. What was done by him amounted to a conversion of the hundi, and the proceeds of the hundi received by him are the moneys of the true owner : *Arnold v. Cheque Bank* (1876) L.R. 1 C.P.D. 578 and *Heilbut v. Nevill* (1870) L.R. 5 C.P. 478.

4. The next question is, who was the true owner of the hundi at the date of suit? It is contended on behalf of the first and second defendants that the true owner of the hundi at the date of suit was the third defendant and not the plaintiff, and that the plaintiff therefore is not entitled to maintain this suit. Now it is elementary law that in order to make the property in a bill pass it is not sufficient to indorse it; it must be delivered to the indorsee. Such delivery, as enacted in Section 46 of the Negotiable Instruments Act may be actual or constructive. Counsel for the defendants contended that by the regulations of the Indian Post Office a letter once posted cannot be reclaimed, and since the plaintiff had not only indorsed the hundi to the third defendant, but posted the letter enclosing the hundi to him, the property in the hundi passed to the third defendant, and he alone therefore was entitled to sue. Reliance was placed in support of this contention on *Ex parte Cote* (1873) L.R. 9 Ch. 27.

5. The authorities go to show that the post office is the agent of the person to whom the bill or note is posted if there be express or implied authority to send by post, but if there be no such authority the post office is the agent of the sender :- See *Chalmer's Bills of Exchange*, 8th Edn., p. 61; *Halsbury*, Vol. II, p. 481 In *Ex parte Cote Mellish* L.J. said:

In this country, where the sender of a letter cannot get it returned after it has been posted, if the indorsee of a bill authorises the indorser to send the bill through the post office, the bill as soon as it is posted becomes the property of the indorsee.

6. In that case the authority to send the bills by post was implied from the course of dealings between the parties, but as by the rules of the French Post Office a letter, though posted, could be reclaimed before it was dispatched from the office where it was posted, it was held that the property in the bills which were posted from Lyons and claimed back by the indorser did not pass to the indorsee. In *Norman v. Ricketts* (1886) 3 T.L.R. 182 the plaintiff's wrote from London to the

defendant in Suffolk asking her to send a cheque for money due by her. The defendants sent by post a cheque for the amount due. The cheque was stolen in transit, and the thief got it cashed. It was held that the posting was a good delivery to the payee, and the cheque operated as payment. This is a case of express authority to send by post. This case was followed in *Thairlwall v. Great Northern Railway* [1910] 2 K.B. 509 which was a case of a dividend warrant sent by the defendant company to the plaintiff', The warrant was lost in the post. In a suit to recover the dividend it was held that the posting of the warrant operated as payment, In the course of his judgment Lord Coleridge J. said:

The real question is whether the posting of the warrant was payment of the amount of the dividend. To establish that it was, the defendants must prove a request by the plaintiff or an agreement between the plaintiff and defendants that payment should be made by means of the warrant posted to the plaintiff.

7. In the present case the first and second defendants contend that the property in the hundi passed to the third defendant immediately it was indorsed and posted. The first and second defendants must, therefore, show that there was an authority, express or implied, from the third defendant to the plaintiff to send the hundi by post. It is not suggested that there was any express authority. Nor is there any evidence on record of implied authority. There was, therefore, no delivery to the third defendant, and the negotiation of the hundi to him was not completed. The property in the hundi never in fact passed out of the plaintiff, and it remained his property when it reached the hands of the first and second defendants. Moreover, the third defendant never claimed any property in the hundi, On the contrary, he enforced his claim by a suit against the plaintiff in the Residency Court.

8. I, therefore, hold that the property in the hundi was in the plaintiff' at the date of suit, and pass judgment against the first and second defendants for Rs. 1500, costs including costs of commission and costs reserved, and interest on judgment at six per cent, per annum

9. Plaintiff's attorneys tube at liberty to withdraw Rs. 800 being the amount deposited by the plaintiff as security for the costs of the first defendant after the expiration of the period of appeal.

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