

(1871) 03 CAL CK 0008

Calcutta High Court

Case No: None

Somarimull

APPELLANT

Vs

Bhairo Das Johury

RESPONDENT

Date of Decision: March 31, 1871

Judgement

Paul, J.

The plaintiff sues as endorsee his immediate endorser, the defendant, on a bill for Rs. 2,500 drawn by Narayan Sing and Co., and accepted by Charles Nephew and Co. There was an endorsement from Narayan Sing and Co. to the defendant prior to that of the defendant to the plaintiff. The facts of the case are few, but not wholly free from doubt. The bill became due on the 3rd December 1870 which was a Saturday. On that day the plaintiff, who was the then holder (having discounted the bill), sent his jemadar, Narayan Sing, to Charles Nephew and Co. to receive payment. The jemadar arrived during business hours, but it appears the bill was taken by Mr. Alcock, and a cheque given him about the time the banks usually close on a Saturday. Having received the cheque and given a receipt, he went and found the bank closed. The defendant admits he was similarly treated, and saw the plaintiff's jemadar at the Calcutta Bank. The bank being closed, the jemadar went back to Charles Nephew and Co., and represented that the cheque had not been paid, and demanded cash. He was not paid the cash, but was advised to go away, and it was stated that the cheque would be honored on Monday. He went away apparently satisfied, but the plaintiff's gomasta appears not to have been so satisfied, and sent him to the defendant to inform him that the hundi had not been paid, as the cheque could not be cashed, and required the defendant as his immediate endorsee to pay the amount of the hundi. There were two interviews on Saturday with Indu Mull. As to what took place at these interviews is differently stated by Indu Mull and the plaintiff's jemadar, Narayan Sing. I think the account given by the latter is the more truthful, though both the parties have exaggerated their case, Indu Mull having the greater motive for exaggeration. Narayan Sing says, Indu Mull said, do not fret yourself, you will get your money on Monday; if you do not, I am personally liable." Indoo Mull says he said, Produce the hundi, I will pay you at once; if you do not produce it now, I won't pay you

tomorrow." I do not believe Indu Mull, or that the notion of repudiating his liability if the hundi were not presented to him on that day, occurred to him then. He was also the endorsee of a hundi for Rs. 7,000 which he had left with Messrs. Charles Nephew and Co., and had taken a cheque; and though he now says he took the cheque in full satisfaction, it is clear that that notion did not enter his mind then, as on Monday he gave notice to his immediate endorsee, and he admitted he did it to make the immediate endorsee liable. There is another circumstance which confirms Narayan Sing; he said Indu Mull told him he had a cheque for Rs. 7,000 not paid. Both were companions in misfortune, and one of them would hardly repudiate a hundi for Rs. 2,500, which repudiation affected his own hundi for Rs. 7,000. But Narayan Sing is not only less interested than Indu Mull, but when I consider that the latter individual has deliberately made a false statement, I must necessarily hold his credit impaired. I now proceed to show in what respect he has done so. Indu Mull said he never told Narayan Sing about the cheque for Rs. 7,000, and added he might have been told by some one; afterwards he said he met Narayan Sing at the bank. I do not believe Indu Mull acted as jemadar and went to the Calcutta Bank to receive payment of his hundi for Rs. 7,000. I believe Indu Mull told Narayan Sing that he had a hundi for Rs. 7,000, and I consider the former told a most deliberate falsehood as to a material fact, which goes to corroborate the plaintiff's story that both parties had made up their minds to wait till Monday. I have no doubt that Indu Mull gave Narayan Sing the assurance that he would be paid on Monday, and asked him to wait till then, but I do not believe he said anything as to the defendant's liability. I believe that Narayan Sing was petulant and querulous, and was only appeased by Indu Mull's assurance that the cheque would be honored on Monday. On the Saturday Indu Mull knew the hundi was with Charles Nephew and Co.; and had he asked for the hundi, there would have been little or no difficulty in procuring it. Narayan Sing's version of the assurance held out by Indu Mull is confirmed by Surup Sook, who says Indu Mull never repudiated his liability. Surup Sook says he went twice on Monday, and that as soon as he was told to procure the hundi he went and procured it. His testimony has not been shaken by the severe cross-examination to which it has been subjected. Putting the evidence of the two against that of Indu Mull, who is not trustworthy, I conclude that it was agreed they should wait till Monday, and all question of liability remained in abeyance.

2. As to the striking out of the name of Charles Nephew and Co., if Mr. Kennedy could have proved his instructions, we should have known how the name was struck out, but there is no evidence as to how it was done. If it was done by consent it would have terminated all liability. In this case the story is one sided, and it is clear it must have been done without consent as the signature was at once restored when required. Probably the signature was struck out by Charles Nephew and Co. as indicating that they had paid the bill. I find it was not struck out with the consent or privity of the plaintiff.

3. The next question is, whether the cheque was taken in lieu of the bill? It is laid down by Mr. Justice Byles in his work on Bills of Exchange, page 229 10th Ed., 235, as follows:--

If a bill or note be taken on account of a debt, and nothing be said at the time, the legal effect of the transaction is this, that the original debt still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditor. This effect of giving the bill has also been described as a conditional payment.". Applying these principles to this case, the cheque must be taken to have been a conditional payment, and when it was dishonored, the liability on the original bill revived. There is a passage quoted by Mr. Kennedy from Chitty on Bills, page 276, which shows that when a man receives a cheque and gives a bill up, he gives up all claim. In support of this passage a manuscript case is cited. But immediately succeeding this passage is the following:--"So where a cheque is received in payment, the person who passed it to the holder of the bill is discharged if due diligence is not used to obtain money for it--Moule v. Brown 4 Bing. N.C., 266; and so also is the drawer of the cheque, if in consequence of such delay, his money has been lost"--Robinson v. Hawksford 9 Q.B., 52. Mr. Marindin relies on another passage in the same work, page 277, to the following effect:--"So the acceptance of a creditor of a cheque in his favor drawn by the debtor operates as a payment unless it be dishonored"--Pearce v. Davit 1 M. & Rob., 365, These authorities tend to show that the mere taking of a cheque, which is subsequently dishonored, after having been presented in due course of business, does not operate as a payment of the bill.

It appears to me, that to operate as a discharge, the cheque must be taken and accepted in full satisfaction of the bill. In this case, there is no evidence of an agreement or understanding that the cheque should be so taken; I am therefore left to gather the intention of the parties from the proved facts of the case. The conduct of the plaintiff in putting himself in communication with the endorsee as well with the acceptors, and the conduct of the acceptors in giving up the bill and restoring their signature, prove to my mind the absence of any understanding or intention on the part of the parties to treat the cheque as having been taken in full satisfaction of the bill. I therefore hold that the cheque was not taken in full satisfaction and discharge of the bill, and the cheque being dishonored, the rights and liabilities of the parties to the bill continued in full operation, unless the liability of the defendant was gone by reason of the hundi not being produced to him on the Saturday and payment demanded, or by reason of notice of actual dishonor not having been given until Monday. I must be guided by the precedents cited by Mr. Graham with reference to notice of dishonor as between natives. But Mr. Kennedy contends that the law which I have to administer is the Hindu law to the Hindus and Mahomedan law to the Mahomedans; he asserts there is nothing in Hindu or Mahomedan law relating to bills of exchange, consequently this Court is bound to apply the *lex fori*. Similar arguments were used by Chief Justices Peel and Colvile in *Musleah v. Musleah* Fulton, 420. Mr. Kennedy further urges that the adoption of an English form of bill implies that the parties contracted with reference to the English law. It was similarly urged by Mr. Dickens, in 6 M.I.A. 53 (Privy Council) , before the Privy Council, that the English form of the conveyance showed the father meant the English law to apply, but their Lordships were of opinion that though the observation was a fair one to make, it would not be right to give weight to a deduction which seemed to be far fetched. Here the argument from the

form of the bill of exchange is in strict analogy with the argument which the Privy Council would not countenance. It is very sound sense that notice of dishonor should be given within a reasonable time, and if possible, immediately, and the absence of such a notice should be a ground of defence if the person entitled to the notice has been thereby prejudiced. These propositions are enunciated in the cases cited by Mr. Graham,--namely, *Gapinath v. Abbas Hossein Ante*, p. 434, [Gopal Das Vs. Sheikh Syad Ali and Others](#), and *Pigue v. Golab Ram* 1 W.R., 75, As both Charles Nephew and Co., the acceptors, and Narayan Sing and Co., the drawers and immediate endorsees of the defendant, were wholly and hopelessly insolvent on the Saturday, the day of the maturity of the bill, the total absence of notice (if such were the case) could not possibly prejudice the defendant, and cannot, according to the views last expressed, be insisted on as a defence. I hold that by the consent of the defendant all matters were put off till Monday, and that consent bridges over any difficulty which may be raised according to English law, on the ground that the bill not having been paid on the Saturday, it was necessary to give notice of dishonor on that day. The presentment of the cheque having been put off till Monday by the consent and knowledge of the defendant, and the cheque not having been paid on that day, it may be taken that the bill was actually dishonored on the Monday, and that being so, I find on the evidence that immediate notice was given to the defendant, and on the same day the bill presented to him for payment. But if the bill must be taken to have been dishonored on the Saturday, I find reasonable notice of dishonor was given on Monday. If notice of any particular form and at any particular time is customary, the defendant should have adduced evidence in proof of such custom, but this he has failed to do. The contract on a bill between endorser and endorsee is that if the acceptor does not pay the endorsee will pay. The rule that want of notice discharges is a matter of comparatively recent practice in the English law; the old rule was that it would not discharge, unless the party to be rendered liable was prejudiced. On the whole, then, I consider the plaintiff is entitled to succeed, and to recover the amount of the bill or hundi from the defendant. I should probably not have awarded the plaintiff costs in this case, but the defendant's conduct in the witness-box exhibited such gross dishonesty of purpose, as to lead me to believe that the suit has been dishonestly defended. I consequently consider the ordinary rule that the successful party should have his costs, should not be departed from in this case. The plaintiff is entitled to a decree with costs.

The Advocate-General and Mr. Bell

Mr. Peterson and Mr. Graham

Peacock, C.J.

This was an action of assumpsit brought by the plaintiffs, who were the holders of a hundi for Rs. 2,000 drawn by the defendant upon one Mirza Abdul Hossein. The plaintiffs allege that the defendant, who was a Mahomedan inhabitant of Calcutta, on 12th October 1860, made this hundi, and directed the same to Mirza Abdul Karim, and thereby required him to pay to the plaintiffs the sum of Rs. 2,000, twenty-one days after date, and that the said Mirza Abdul Karim did not pay the amount of the hundi at the due date, although it was then presented to him, and that the plaintiffs within a reasonable time after the hundi had been so presented, had called upon the defendant to pay them the amount thereof; and that in consideration thereof the defendant promised to pay the amount thereof, but did not pay the same. To this plaint the defendant pleaded that he did not promise as in the plaint alleged. The plea ought to have been special; and as it stands, it would have been bad on demurrer; but not having been demurred to, it must be taken to traverse all the material allegations in the plaint. An objection was taken by the defendant's counsel that one of the plaintiffs, Gapinath, being dead, the action was not maintainable. A letter of demand, written by the plaintiffs' attorney, demanded payment of the hundi in the names of Gapinath and Gopal Lal; and in answer to that letter, the defence raised was that no notice of non-payment by Mirza Abdul Karim had been given to the defendant as drawer. At that time it was known to the defendant that Gapinath was dead, and that therefore no promise could have been made to him, or implied in law in his favor. The firm of Gapinath and Gopal Lal is still in existence, and the parties who are members of that firm would be liable to pay the costs of this action in the event of failure, and therefore the objection taken by counsel, on the ground that the defendant could not recover his costs in the present case as against the plaintiffs on the record, must fail.

The next question is, whether the facts stated in the plaint have been proved, and if proved, whether they are sufficient to fix the defendant with liability. The circumstances of the case show that the amount of the hundi not having been paid by the acceptor, became payable on request by the defendant as drawer. There was no strict proof of the money not having been paid on due date by the acceptor, but the plaintiffs' gomasta swears that he went to the defendant on 14th November, and applied to him for payment of the hundi, on the ground that the acceptor had not paid it on presentment at due date, to which application the defendant said:--Do not distress yourself, it will be paid;

And the letter of the defendant's attorney amounts to an admission that the money had not been paid at due date. Was then the 14th November a reasonable time after the falling due of the bill to give notice of dishonor to the drawer? We think it was a reasonable time, and that the special count is made out, and the plaintiff is entitled to recover. We therefore think it unnecessary to enter into the question whether, according

to Mahomedan law, notice of dishonor should be given. But if we were called upon now to decide the point, we should be of opinion that this case should be governed by the Mahomedan law, and that we do not find anything in that law to show that notice of dishonor to the drawer is necessary to be given, Mr. Peterson argues that the *lex fori*, which he contends is the English law, should be applied to this case; but the *lex fori* of this Court, according to the Charter, is in a case like the present the Mahomedan law. Questions of mercantile usage in English law used in former days to be proved by evidence. So in the present case then there should have been evidence of usage amongst Mahomedans, if any existed, to show that notice of dishonor to the drawer was necessary. We find nothing in the evidence to show the necessity of such a notice. We therefore find a verdict for the plaintiff for Rs. 2,000, the amount of the hundi; the decree to carry interest at six per cent, until satisfaction.