The Bank of Bengal Vs Mendes

None

Court: Calcutta High Court

Date of Decision: Feb. 3, 1880

Acts Referred:
Contract Act, 1872 â€" Section 160#Evidence Act, 1872 â€" Section 117

Citation: (1880) ILR (Cal) 654

Hon'ble Judges: Richard Garth, C.J; Pontifex, J

Bench: Division Bench

Judgement

Richard Garth, C.J.
This suit is brought by the Bank of Bengal to recover from the defendant the sum of Rs. 14,700 and interest upon his

promissory note.

2. The defendant"s answer is, that the note was given to secure to the Bank the repayment of a loan, which they made to him in October 1878;

that, as part of the same transaction, he deposited with the Bank, by way of further security, certain Government notes, one of which was for Rs.

10,000; and that he is not bound to pay them their money, unless they are prepared to give him back these notes.

3. The Bank are ready to give up all the securities, except the note for Rs. 10,000, which they say that they are unable to return for the following

reason:

4. In one branch of their establishment they carry on the ordinary business of bankers; in another, which is called the Public Debt Office, they have

the management of the public debt on behalf of the Government, both branches being under the charge of officers who are employed and paid by

the Bank of Bengal.

5. Before the loan in question was effected, the Government note for Rs. 10,000 had been sent from the treasury at Backergunge to the Public

Debt Office for ""enforcement,""--that is to say, for the purpose of being marked, so that interest might be obtained upon it at the Backergunge

treasury. It does not appear on whose behalf this note was sent from Backergunge, or who was the actual holder of it at that time. The learned

Judge finds upon the evidence, and in this I quite agree with him, that the note was stolen whilst in the Public Debt Office, by an officer employed

there, called Grish Chunder Banerjee (in fact we now learn that this man has been subsequently convicted of stealing it), but the theft had not been

discovered at the time when the defendant"s loan was effected; and consequently when the Bank sent at that time to enquire at the Public Debt

Office, whether the note had been stopped, the answer was, that it had not.

6. The theft, however, having been afterwards discovered, a notice in the usual course was inserted in the Calcutta Gazette, that, in consequence of

the note having been stolen, the payment of the note and of interest upon it was stopped.

7. On the 29th of November the note was, at the request of the defendant, sent by the Bank to the Public Debt Office, in order that interest might

be obtained upon it, and it was then and there stopped by Mr. Biss, who was the officiating Superintendent in that office.

8. A letter of the 6th of October 1878 was then sent by the Bank to the defendant, requesting him at once to repay the loan, and informing him that

the Rs. 10,000 note had been stopped.

9. Upon this a correspondence ensued, the effect of which was, that the defendant refused to pay the money, until the Rs. 10,000 note was

returned; and the Bank, on the other hand, insisted that they could not, and were not bound to return it, because it was stopped in the Public Debt

Office.

10. In this state of facts the learned Judge in the Court below has decided, that the plaintiffs have shown no sufficient reason for refusing to return

the note to the defendant. He considers that they are in a position to return it, and that until they do so, the defendant is not bound to repay the

money. And he seems to say further, that, assuming, the plaintiffs to have the right to hold the note against the defendant, if they could show that

they had a better title to it than he has, they have not shown such a title.

11. I am unable to take this view of the plaintiffs" rights or position. I quite agree, that if it were in the plaintiffs" power, consistently with their

relations to the Government, to return the note to the defendant, they must be ready to do so before they could ask for repayment of the loan.

12. But it appears to me in the first place, that it is no longer optional with the plaintiffs to return the note to the defendant. It has been stopped in

that branch of their establishment where they are acting, not in their capacity of private bankers, but as the agents of the Government. The Public

Debt Branch of the establishment seems to me, for the purposes of this question, to be as much a Government office as if it were carried on

separately under the management of officers in direct Government employ.

13. That being so, this note was stolen whilst it was virtually in the hands of the Government. It was in the custody of the Government on behalf of

the person to whom it belonged at the time when it was stolen from the Public Debt Office.

14. It then came into the possession of the plaintiffs, when the defendant''s loan was effected in their private capacity of bankers, and at the

defendant''s own request it was sent to the Public Debt Office to obtain the interest payable upon it. It was then and there detained by the

Superintendent of the Public Debt Office; and I consider that, as he held it as the agent of the Government on behalf of the true owner at the time

when it was stolen, he was not only at liberty but bound to detain it on behalf of that person, when it thus came back into his possession.

15. It was contended on the part of the defendant that the Public Debt Office had no right to detain the note; and that, at the utmost, they could

only have given notice to the person for whom they originally received it, to enable him to contest the defendant''s title; and if he did not contest it

within a certain time, they were bound to return it to the defendant. But I think, as at present advised, that this was not the position of the Public

Debt Office. It might have been their position, no doubt, if they had received a notice in the nature of a stop-order from some third person, who

had lost it, or from whom it had been stolen. But as they were themselves the custodians of it when it was stolen from them, I think that they were

justified in detaining it, as such custodians, until the defendant could make out a better title to it than the person for whom they received it.

16. But however this may be, the Bank had no right or power in my opinion to take it, in their private capacity, out of the hands of the Public Debt

Office.

17. If the Bank of Bengal and the Public Debt Office had been two separate establishments, the one under the charge of the Bank officers, and the

other under the charge of the Government, I take it there would have been no doubt that the Bank, under the circumstances, would have had no

power of returning it to the defendant; and it seems to me that the fact of the Public Debt Office being managed by the Bank, instead of by the

Government, makes no difference in this respect.

18. I cannot accept the view, which appears to have been acted upon in the Court below, that the Bank are detaining the note ""for their own

protection and in their own interest."" This is not, I think, what the Bank''s witnesses say or mean; and it is not the Bank''s true legal position. In my

opinion the Bank, in its private capacity, has no more right or power to take the note out of the hands of the Public Debt Office, after it has been

detained there, and to hand it over to the defendant, than it would have had, if the Public Debt Office had been a separate Government

establishment.

19. If this were not so, and if the rights of holders of Government paper were to be less secure in consequence of both establishments being under

the control of the Bank officers, I think it would clearly not be right, in the interest of persons dealing with the Government, to allow the public debt

to be any longer managed by the Bank of Bengal.

20. But there is another view of this case which has been dealt with by the Court below, and which also appears to me to afford a complete

answer to the defendant"s contention.

21. Assuming the Bank to be now bailees of the note, and to have no right to detain it as against the defendant, unless they can show that they hold

it by a better title, the question then arises, whether they have not in fact proved that they hold it by a better title?

22. Now I quite agree with the Court below that, in determining this question, the onus probandi in the first instance lies upon the Bank. They are

bound to show that they hold the note by a title superior to the defendant; and even if they prove such a title prima facie, the defendant is at liberty

to rebut it by proving a better one.

23. Then how stands the evidence in this respect?

24. The defendant does not pretend to say that he was the owner of the note when it was sent to the Public Debt Office from Backergunge, or that

he derives title from the person who owned it at that time. His title, such as it is, is derived from Grish Chunder Banerjee who stole it.

25. Now I take it to be clear law, that when an instrument, such as the note in question, has been stolen, the person from whom it was stolen has a

good title to it, not only as against the thief, but as against any person who subsequently becomes the holder, unless such person can prove that the

instrument had become negotiable at the time it was stolen, and that he obtained it bona fide for value without notice of the theft.

26. See Raphael v. The Bank of England (17 C.B. 161), Miller v. Race (1 Smith"s L.C. 7th Ed. 516), and authorities there cited.

27. Now here I am satisfied that the note was stolen whilst it was in the custody of the Public Debt Office, and before the defendant had any title

to it. The Bank, therefore, as agents for the Government, on behalf of the true owner from whom and for whom they received it, have prima facie a

better title to the note than the thief, or any one claiming it from or through the thief. They have shown, therefore, prima facie, as it seems to me,

that they hold the note by a title superior to that of the defendant.

28. But then has the defendant rebutted that prima facie case by showing that he is a bona fide holder of the note for value? I think he has not.

29. The first thing which he was bound to prove for this purpose was, that the note at the time it was stolen was a negotiable instrument; that it had

become so by being endorsed in blank. Of this he has given no evidence. He has not shown that any of the endorsements prior to that of Grish

Chunder Banerjee were genuine, or that they were upon the note at all before it was stolen.

30. The learned Judge in the Court below has relieved the defendant from this difficulty, by presuming, in the absence of evidence to the contrary,

that the apparent endorsements prior to that of Grish Chunder were genuine. But in this I cannot agree with him. I think that we have no right to

make any presumptions in favour of the holder of a stolen note. On the contrary, we are bound to see, for the protection of the party who has been

robbed, that every link of the holder''s title is strictly proved. If Grish Chunder, Banerjee was rogue enough to steal the note, he might well have

been also rogue enough to forge endorsements for the purpose of giving it an appearance of negotiability.

31. I do not enter into the further question, which will probably have to be decided in another suit, whether, assuming the negotiability of the note,

the defendant has sufficiently shown that he is a bona fide holder for value.

32. There is nothing in our present judgment to prevent him from bringing a suit against the Government, or against the Bank of Bengal as agents of

the Government, or both, to establish his title to the note as against the party who was robbed. All that we have to decide here is, whether the

plaintiffs are entitled in this suit to recover from the defendant the amount due for principal and interest upon the note made by himself; and for the

reasons which I have already given, I consider that they are so entitled.

33. I think, therefore, that the judgment of the lower Court should be reversed, and that the plaintiffs'' claim should be decreed, with interest at the

current rate charged by the Bank of Bengal, from the 23rd October 1878 to the date of this decree, and thereafter on the aggregate amount of

principal and interest at the rate of 6 per cent., with cost in both Courts on scale 2.

Pontifex, J.

34. In this case the defendant, having taken a loan from the Bank of Bengal, deposited with them as security for it, three Government loan notes,

one for Rs. 10,000, one for Rs. 5,000, and one for Rs. 1,000, and by way of collateral security gave the Bank a promissory note.

35. The Bank of Bengal, in strict performance of their duty to the defendant for the purpose of drawing interest on his behalf, and at his request,

presented the loan note for Rs. 10,000, at the Public Debt Office, the conduct of which, as it happens, has been confided to the Bank by the

Government, and the business of which is carried on in their premises but in separate rooms, through separate officers, and by separate books.

36. The Public Debt Office, rightly or wrongly (as to which I decline to give any opinion in this suit), detained the note, insisting that it had been

stolen from their previous custody, and they decline to give it up without suit. The Advocate-General, representing the plaintiff Bank, has formally

denied on behalf of his client that the Bank qua Bank detains the notes.

37. Under these circumstances the Bank having been deprived, at least for the time, of the main portion of their security, and being under

reasonable apprehension that it may ultimately prove valueless, sue the defendant on his promissory note. The defendant resists the suit on the

ground that he is not bound to pay until his securities are returned to him, and a decree has been made in the lower Court upon that footing. It

seems to me that, even if the Bank had by carelessness lost or mislaid the security, or if it was responsible for the detention of the loan note, the

proper decree would have been for payment into Court by the defendant of the amount due by him, as in Schoole v. Sall (Sch. Lef. 176); see also

Benttnck v. Willink (2 Hare, 1).

38. But as I view the evidence, and having regard to the disclaimer by the Advocate-General of any detainer by the Bank--qua Bank--the case

presents itself to my mind under the following aspect:A mortgagor gives a mortgagee what is either a bad security, or what can only prove to be a

good security after the delay and cost of legal proceedings.

39. In the first case, the mortgagor has certainly no case for resisting payment; and in the latter case, I cannot see that he has any equity to force his

mortgagee, who has no knowledge of the manner in which the defendant became possessed of the note, to take proceedings for his benefit which

must take time and may be inoperative, and meanwhile to keep his mortgagee out of his money. At the most, what he seems to me entitled to ask

his liberty, if necessary, to take proceedings in his mortgagee"s name upon an undertaking to indemnify the mortgagee against costs. Either with or

without that liberty I think he is bound to pay the debt.

40. The case has been argued as if it were a case of bailor and bailee, and Section 160 of the Contract Act has been relied on. But that section is

not even included among the sections which relate to bailment of goods as security for payment of debts (see Section 172 to Section 179). In my

opinion neither Section 160 of the Contract Act, nor Section 117 of the Evidence Act, affects the present suit.

41. I think, therefore, the decree below must be reversed with costs on scale 2, and the defendant, having such liberty as I have mentioned, must

be directed to pay to the plaintiff Bank the principal and interest secured by the promissory note up to the date of our decree, with subsequent

interest at the rate of six per cent., on the aggregate amount of principal, interest, and costs, up to the date of payment, upon the return by the Bank

of the loan notes for Rs. 1,000 and Rs. 5,000 respectively.

Richard Garth, C.J.

42. With regard to what has just been said by my learned colleague, I quite agree that the defendant should be at liberty to use the Bank"s name, if

he pleases, upon giving them an indemnity, and also that when he pays the sum due, he is entitled to a return of the securities other than the Rs.

10,000 note.