ORIGINAL CIVIL.

Before Lort-Williams J.

1940
June 17, 26.

SYED MAHAMMAD YAKUB
v.
IMPERIAL BANK OF INDIA.*

Cheque—*Countermand of payment—Bank's liability—Negotiable Instruments Act (XXVI of 1881), ss. 10, 31.*

A bank, which has negligently paid a cheque notwithstanding countermand of payment by the customer, cannot debit the customer's account with the amount of the cheque.

Cohen v. *Hale* (1); *Wienholt* v. *Spitta* (2) and *Reade* v. *Royal Bank of Ireland* (3) referred to.

The current account rule of a bank that "the bank will register instructions from the drawer regarding cheques lost, stolen, *etc.*, but cannot guarantee constituents against loss in such cases in event of a cheque being paid" applies to events happening prior to the time when a cheque reaches the bank and is presented for payment and has no application where the negligence is committed by the bank after presentation.

ORIGINAL SUIT.

The facts of the case appear sufficiently from the judgment.

I. P. Mukherji and *J. P. Mukherjee* for the plaintiff. A cheque on being stopped becomes a piece of waste paper. *Wienholt* v. *Spitta* (2). The position is the same as if the cheque had never been given. *Cohen* v. *Hale* (1). Under the English Common Law and also under the Bills of Exchange Act, 1882, the authority of a banker to pay a cheque is determined by countermand of payment by the customer. *Reade* v. *Royal Bank of Ireland* (3). The current account rule of the bank has no application where a cheque is paid through the negligence of the bank after presentation.

*Original Suit, No. 118 of 1940.

(1) (1878) 3 Q. B. D. 371. (2) (1813) 3 Camp. 376; 170 E.R. 1416.
(3) [1922] 2 I. R. 22.

S. Chaudhuri for the defendant. The bank is protected by cl. 5 of its current account rule. As the bank paid the cheque in due course, its liability stands discharged. Negotiable Instruments Act, s. 85.

I. P. Mukherji, in reply. The bank in paying the cheque is guilty of negligence, hence it cannot be a payment in due course within the meaning of s. 10.

Cur. adv. vult.

LORT-WILLIAMS J. The plaintiff's claim is for money had and received.

He had, at all material times, a current account with the defendant bank. In the first week of February, 1937, he drew a cheque No. A14766 on the bank for Rs. 6,250 in favour of B. S. Makani, post-dated March 20, 1937. On February 14, 1937, he wrote to the bank countermanding that order for payment, which was acknowledged by the bank on March 20, 1937. Nevertheless, and contrary to these instructions, on June 10, 1937, the bank cashed the cheque, made payment to Makani and debited the plaintiff's account with the amount.

The plaintiff alleges and the bank denies negligence.

The bank also relies on clause 5 of its Current Account Rules, knowledge of which is admitted by the plaintiff, and which reads as follows :—

> The Bank will register instructions from the drawer regarding cheques lost, stolen, *etc.*, but cannot guarantee constituents against loss in such cases in event of a cheque being paid.

There can be no doubt that the bank was guilty of negligence, which was the direct cause of the plaintiff's loss.

In a letter, dated July 12, 1937, from the bank to Messrs. Thos. Cook & Son (Bankers), Ltd., it is stated that the payment had been made by mistake and through clerical oversight, and in a letter, dated

1940

Syed Mahammad Yakub v. The Imperial Bank of India.

Lort-Williams J.

July 13, 1937, from the bank's agent, he admitted that the payment had been made, on account of oversight due to rush of heavy work on a particular day, from the Register of Stopped Cheques, and explained how the ledger-keeper had not followed the instructions regarding the recording of stop, and promised to make good the loss.

In my opinion, the rule relied on by the bank is irrelevant. The cheque was not lost or stolen and "*etc.*" must be read *ejusdem generis*. The rule is intended to apply to events happening prior to the time when a cheque reaches the bank and is presented for payment. Not to negligence committed by the bank after presentation.

The relation between a banker and his customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with the superadded obligation to honour the customer's cheques when the banker has sufficient assets of the customer available for that purpose, the money so paid into the bank being, in fact, money lent to the banker on the terms that it should be repaid when called for by cheque. *Foley* v. *Hill* (1), and the Indian Negotiable Instruments Act, s. **31**.

In s. 75 (*1*) of the Bills of Exchange Act, 1882, it is provided that the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment. This Act is not applicable to India, but the Common Law, including the Law Merchant, is applicable to suits on the Original Side of this Court, and upon this point is the same as provided in s. 75 (*1*).

Thus, in *Cohen* v. *Hale* (2) it was held that, upon a cheque being stopped, the position was the same as if it had never been given, and in *Wienholt* v. *Spitta* (3), Lord Ellenborough observed that a stopped cheque became a piece of waste paper in the hands of the payee.

(1) (1848) 2 H. L. C. 28; 9 E.R. 1002. (2) (1878) 3 Q. B. D. 371.
(3) (1813) 3 Camp. 376; 170 E.R. 1416.

In *Reade* v. *Royal Bank of Ireland* (1), the plaintiff had a current account in the defendants' bank, which was in funds. The plaintiff drew a cheque on this account in payment of a gambling debt, but, prior to its presentation, countermanded by telegram payment of the cheque. Notwithstanding the countermand, the defendants subsequently honoured the cheque on presentment. The plaintiff did not sue the payee of the cheque for the recovery of the money, nor did he prove that he could not have recovered from the payee. It was held by the Court of Appeal that the defendants were guilty of a breach of duty as bankers, and that the plaintiff was entitled to recover from them the amount of the cheque.

Ronan L. J. said :—

But what was the effect of the countermand? Section 75, sub-s. (*1*) of the Bills of Exchange Act, 1882, says (and the Lord Justice read the words of the section). Four years before, the case of *Cohen.* v. *Hale* was decided. It is cited as applying to the section by Sir M. Chalmers, and referred to Hart on Banking as the existing law. I take the statement of the case from pp. 326-7 of that book. This puts the case in the same position as if the payment had been made without any cheque for the amount having ever existed. It follows, therefore, that as between the plaintiff and the defendant the case must be treated precisely in the same way as I have dealt with the case of no cheque and no request. The question here would directly arise if the plaintiff brought an action of debt for his balance, and the bank sought to set off this payment *pro tanto*.

And O'Connor L. J. said :—

The relation of a bank to its customer is that of debtor to creditor. A bank can, and, indeed, must, diminish its indebtedness to the customer by obeying the mandate of the customer to pay away to third parties moneys up to the amount which the bank owes to the customer, or, in other words, which is standing to the credit of the customer's current account. The mandate is, of course, usually given by cheque. But a bank cannot diminish its indebtedness where no such mandate is given, or where a mandate is given but subsequently withdrawn, for that is the same as if no mandate were given at all.

Moreover, though s. 85 (*1*) of the Indian Negotiable Instruments Act provides that, where a cheque payable to order, purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course. Section 10 defines "payment

(1) [1922] 2 I.R. 22, 25-7.

1940

Syed Mahammad Yakub v. The Imperial Bank of India.

Lort-Williams J.

"in due course" as meaning payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof, under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned. As I have shown already, the payment in this case was not made "without negligence", and was not, therefore, a payment made in due course, so as to discharge the bank.

The result is that the bank was not entitled to debit the plaintiff's account and is still indebted to him in the sum of Rs. 6,250. The bank does not pay interest on current accounts, therefore, the plaintiff has not suffered any damage on that score, and no other damage has been proved. The plaintiff is entitled to judgment for Rs. 6,250 only, with interest and costs.

Suit decreed.

A. C. S.