APPELLATE CIVIL.

Before Zafar Ali and Dalip Singh JJ.

PUNJAB INDUSTRIAL AGENCY, LTD., IN LIQUIDATION (DEFENDANT) Appellant

versus

MERCANTILE BANK OF INDIA, LTD. (PLAINTIFF) Respondent.

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Dec. 13.

Civil Appeal No. 1282 of 1925.

Indian Contract Act, IX of 1872, section 72—Money paid by mistake—Banker—stopped cheque paid through negligence—whether recoverable by Banker from payee to whom the drawer owed the money.

Held, that a banker is not obliged to pay a cheque when there are no assets belonging to the customer in his hands; and the countermanding of a cheque by a customer in whose account there are funds sufficient to meet it, cannot do more than cause the obligation to pay, which otherwise existed, to cease to exist.

Thus, where the Bank, overlooking the receipt of a notice from its customer stopping payment of his cheque to a third party to whom he owed money, pays it, a suit by the Bank against the payee for recovery of the amount paid should be dismissed. The Bank should suffer for its own laches and not the payee (creditor).

Chambers v. *Miller* (1), and *K.M.B.R. Firm* v. *Official Assignee of Madras* (2), followed.

Kelly v. *Solari* (3), *Cohen* v. *Hale* (4), *Townsend* v. *Crowdy* (5), and *Bell* v. *Gardiner* (6), distinguished.

Second appeal from the decree of D. Johnstone, Esquire, District Judge, Delhi, dated the 28th February 1925, affirming that of Lala *Parshotam Lal, Subordinate Judge, 2nd class, Delhi, dated the 19th May 1924, decreeing the plaintiff's suit.*

(1) (1862) 134 R. R. 479.
(2) 1923 A. I. R. (Mad.) 17.
(3) (1841) 60 R. R. 666.
(4) (1877) L. R. 3 Q. B. D. 371.
(5) (1860) 125 R. R. 740.
(6) (1842) 61 R. R. 443.

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SHEO NARAIN, for Appellant.

KISHEN DAYAL, for Respondent.

DALIP SINGH J.—The facts of the present appeal are as follows:—The firm of Messrs. Sukhdeo Singh-Joti Parshad arranged with the plaintiff, the Mercantile Bank of India, Limited, Delhi, for an overdraft. On the 14th of September 1922 the firm drew a cheque on the said Bank for Rs. 2,000 in favour of the defendant, the Punjab Industrial Agency, Limited. Before the cheque was presented for payment the firm Sukhdeo Singh-Joti Parshad countermanded payment by a letter to the Bank dated the 3rd January 1923. The defendant presented the cheque for payment on the 3rd of February 1923 to the plaintiff Bank and the cheque was cashed on that date, in forgetfulness of the order of the firm countermanding the payment. On the 19th of March 1923 the Bank discovered the mistake and demanded refund of the amount paid from the defendant. The defendant refused to pay and hence the present suit.

The trial Court decreed the plaintiff's claim which is based on section 72 of the Contract Act, holding that the plaintiff Bank was not estopped from claiming a refund, that the defendant had no knowledge that the cheque had been countermanded, and that the defendant was liable to refund the money quite apart from the question whether a debt was due to the defendant from the drawer of the cheque or not. It accordingly decreed the suit for a sum of Rs. 2,000 and costs and interest at 6 per cent. per annum from date of suit till realisation.

On appeal the learned District Judge held that the case could be distinguished from the case reported

as *Chambers* v. *Miller* (1) because in that case the mistake was between the Bank and its own customer as to the question of funds, whereas in the present case the plaintiff erroneously thought that he was under an obligation to pay the defendant and in fact no such obligation existed. He held that the case was not free from difficulty but dismissed the appeal, relying on *K. M. P. R. Firm* v. *Official Assignee of Madras* (2) and on a volume of the journal of Institute of Bankers, which has not been brought to our notice at all.

The defendant has come in second appeal and his learned counsel has contended, firstly, that the case is indistinguishable from *Chambers* v. *Miller* (1); secondly, that there was no mistake; thirdly, that *K. M. P. R. Firm* v. *Official Assignee of Madras* (2) shows that the scope of section 72 is based on the doctrine of equitable restitution, and that there can be no question of equitable restitution in a case like the present. The argument of counsel for the respondent is as follows :—He contends that section 72 of the Contract Act applies, that the customer has a remedy against the banker, that forgetfulness is also included within the word "mistake," that *Chambers* v. *Miller* (1) is distinguishable, because in that case the Bank was not bound not to pay, whereas here the Bank was bound not to pay. He further contends that the mistake in the present case affects the cheque and therefore the essence of the transaction, whereas in *Chambers* v. *Miller* (1) the lack of assets was not of the essence of the transaction. He has cited Cunningham, 11th Edition, at page 281, Pollock at page 386, Kerr on Mistake, 5th edition, 572, *Kelly* v. *Solari* (3), Leake on Contracts, 7th edition, pages 67 and 68, and

(1) (1862) 134 R. R. 479. (2) 1923 A. I. R. (Mad.) 17.
(3) (1841) 60 R. R. 666.

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Cohen v. *Hale* (1). Secondly, he contends that the Banker has paid his own money under a misapprehension as he could not possibly pay the customer's money and therefore he must be able to recover. In support of this he relies on Chalmers Bills of Exchange, page 239, *Townsend* v. *Crowdy* (2), *Bell* v. *Gardiner* (3). In my opinion, the case cannot be distinguished from *Chambers* v. *Miller* (4) on the ground given by the learned District Judge because it is clear law that a Banker is not obliged to pay a cheque when there are no sufficient assets belonging to the customer in his hands. Therefore, the lack of knowledge or ignorance of the fact of there being assets or of the cheque being countermanded equally extinguished the obligation to pay. The banker in either case mistakenly thought that he was under an obligation to pay, whereas there was no such obligation and no distinction can be drawn between the two cases on this point. Counsel for the respondent recognised this difficulty and therefore urged the distinction that in the present case the banker was bound not to pay and in the other case he was at liberty to pay or not as he chose at his own risk. I am unable to accede to the contention that because a cheque was countermanded, there was an injunction on the banker which made it obligatory on him not to pay. The countermanding of a cheque cannot do any more than cause the obligation to pay, which otherwise existed, to cease to exist. There is, therefore, no force in the distinction which the learned counsel has endeavoured to draw on this point. Further on general principles it seems to me that it was rightly laid down in *K. M. P. R. Firm* v.

(1) (1877) L. R. 3 Q. B. D. 371.
(2) (1860) 125 R. R. 740.
(3) (1842) 61 R. R. 443.
(4) (1862) 134 R. R. 479.

Official Assignee of Madras (1) that the question is really one whether there was or was not an equitable right of restitution. *Kelly* v. *Solari* (2), which was strongly relied on by the learned counsel for the respondent, was a case where the person who had received the money had no right whatsoever to receive the money. In this case the Bank expressly pleaded that whether there was a debt due from the drawer to the holder or not, it made no difference. In my opinion it does make a great difference, and on the pleading we must assume that the debt was due from the drawer to the holder of the cheque. This being so, the holder of the cheque was entitled to receive the money and therefore this case is distinguishable from all other cases cited on behalf of the respondent. The question is solely whether he or the Bank should suffer for the laches of the Bank. It has been contended by counsel for the respondent that in this particular case the holder of the cheque did not suffer any loss by the action of the Bank. It seems to me, however, again that it is clear law that the holder of a cheque is entitled to know on presentation of the same whether the cheque is going to be paid or dishonoured. If he receives the payment, he is entitled to proceed on the assumption that the debt due to him by the drawer has been *pro tanto* discharged and in this particular case he did so proceed and credited the drawer with that amount. Suppose the drawer owed a debt to the holder and the holder had cashed the cheque and the Bank thereafter were to sue to recover the money from the holder and the holder was obliged to refund to the Bank, it might be that the holder would be barred by limitation from recovering from the original drawer. I fail to see how on general principles it can possibly be held that

(1) 1923 A. I. R. (Mad.) 17. (2) (1841) 60 R. R. 666.

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the laches of the Bank should cause the holder of the cheque to suffer loss. The learned counsel for the respondent admitted that in such a case the Bank would not recover. Here again if this is so, I fail to see why some distinction arises in the one case which does not exist where the holder may have some remedy left against the drawer. Why should the holder be troubled to seek his remedy through a Court of law when he has received money to which he was entitled and the mistake, if any, has arisen entirely through the negligence of the Bank. On what principle of equity should a man who has done no more than receive money to which he was entitled from someone who purported to act as the agent of his debtor, be asked to refund the money to the said agent because the principal had withdrawn the authority from the agent before payment and the agent had forgotten all about it. I am not aware of any such principle of equity and in the case of a Bank it would lead to extraordinary complications if after cashing a cheque the Bank were entitled to recover the money on a plea of mistake unknown entirely to the payee of the cheque.

I would, therefore, accept this appeal and dismiss the plaintiff's suit with costs throughout.

ZAFAR ALI J.

ZAFAR ALI J.—I agree

N. F. E.

Appeal accepted.