

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

BANKU BEHARI SIKDAR

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Negotiable Instrument—Forged indorsement—Holder in due course—Onus of proof—Negotiable Instruments Act (XXVI of 1881), ss. 9, 46, 53, 59.

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December 17.

No person can claim a title to a negotiable instrument through a forged indorsement. Such an indorsement is a nullity and must be taken as if no such indorsement was on the instrument.

Chandra Kali Dabee v. E. P. Chapman (1) not followed. *Hunsraj Purmanand v. Ruttonji Walji* (2) followed.

Where a plaintiff establishes the fact that a negotiable instrument was obtained from its lawful owner by means of fraud, the onus of proving that a third party was a holder in due course lies on the defendant.

ORIGINAL SUIT.

THIS was a suit brought by the plaintiffs Banku Behari Sikdar and Parmessur Sikdar, executors of the will of one Gouri Prosad Kundu deceased, to recover from the defendant, the Secretary of State for India, the value of certain Government securities of the face value of Rs. 48,000 under the following circumstances.

Gouri Prosad Kundu, a wealthy inhabitant of Gopalbari in the District of Faridpur, died in Calcutta on the 22nd August 1904, possessed of Government securities of considerable value, and he appointed the plaintiffs his executors. On the 21st November 1904, the plaintiffs applied to the Court of the District Delegate of Faridpur for grant of probate of the testator's will, but owing to protracted litigation between the plaintiffs and the widow of the deceased testator, probate was not obtained till the 21st July 1906. Shortly after the death of the testator, his widow Sreemutty Hemanta Kumari

* Original Civil Suit No. 714 of 1907.

(1) (1905) I. L. R. 32 Calc. 799, 815. (2) (1899) I. L. R. 24 Bom. 65, 67.

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Dassi obtained possession of Government securities for Rs. 48,000 which stood in the name of the testator by means of a forged endorsement from the District Court of Faridpur. The plaintiffs and the administrator *pendente lite* made every effort to trace the missing securities, and from the 25th November 1904 from time to time wrote to the Public Debt Office at Calcutta, informing them of the loss of the securities and the circumstances, of such loss and requesting them to stop the securities, but the Public Debt Office refused to give any information regarding them when the securities were from time to time presented to them for renewal under forged indorsements.

The plaintiffs in their plaint submitted that the Public Debt Office wrongfully threw great obstacles in the way of the plaintiffs and the administrator *pendente lite* and prevented them from getting any information regarding these securities, but on or about the 26th March 1906 the plaintiffs came to learn from a letter written by the Public Debt Office to the Officiating District Judge of Faridpur, that the securities for Rs. 48,000 had been cancelled by renewal. Immediately the administrator *pendente lite* applied for information to the Public Debt Office for the numbers of the renewal notes and for the names and residences of the person or persons in whose favour the notes had been transferred successively, and for the dates of such transfer, but the Public Debt Office declined to give any information whatever, unless the administrator *pendente lite* executed a bond for Rs. 3,852 with approved sureties not to sue them in respect of any of the notes. This the plaintiffs declined, and further submitted that the testator was a holder in due course of the securities in question at the time of his death, and that, as they were his executors, they were entitled to hold the securities, and contended that the Public Debt Office had acquired no title to the securities and had wrongfully destroyed them, which action deprived the plaintiffs of their value.

The plaintiffs also submitted that in the alternative the Public Debt Office had failed to pay the sum secured by the notes, although called upon by the plaintiffs to do so, and they

claimed to be entitled to recover the value of these securities. The defendant the Secretary of State denied that the securities were presented for renewal under forged endorsements, and denied that the Public Debt Office wrongfully put obstacles in the way of the plaintiffs or the administrator *pendente lite* getting information about the securities, and submitted that the securities for Rs. 48,000 were between the 23rd May and the 6th June 1905 on several occasions presented at the Public Debt Office by the Bank of Bengal for renewal by the issue of new notes, and the Public Debt Office in lieu of the said securities and in accordance with the practice of its office, properly, regularly and in due course, issued new notes to the Bank, and the former notes were afterwards cancelled. He denied that the former notes were destroyed and said that they were even now in the Public Debt Office, and submitted that the plaintiffs had no cause of action against him by reason of the renewal and cancellation of the securities in suit, and he submitted that the suit should be dismissed with costs.

Mr. Chakravarti and *Mr. Stokes* for the defendant the Secretary of State. Section 9 of the Negotiable Instruments Act covers the case of defective endorsement. *Hunsraj Purmanand v. Ruttonji Walji* (1), *Chandra Kali Dabee v. E. P. Chapman* (2) referred to. The Indian Contract Act places the offence of forgery on the same footing as any other offence. There is no such thing under the Indian Negotiable Instruments Act as section 24 of the Bills of Exchange Act, which deals with a case of forgery. See section 118, clause (g) of the Negotiable Instruments Act and *Bank of Bengal v. Mendes* (3). The word 'offence,' in section 58 of the Negotiable Instruments Act includes the offence of forgery. The rule laid down in *The London Joint Stock Bank v. Charles James Simmons* (4) applies to this case. *Lloyd's Bank Limited v. Cooke* (5) and *Smith v. Prosser* (6) cited.

(1) (1899) I. L. R. 24 Bom. 65, 67.

(4) [1892] A. C. 201.

(2) (1905) I. L. R. 32 Calc. 799, 815.

(5) [1907] 1 K. B. 794.

(3) (1880) I. L. R. 5 Calc. 654, 665.

(6) [1907] 2 K. B. 735, 754.

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The plaintiffs have failed to show that some of the signatures endorsed are not genuine. The onus is upon the plaintiffs to show that the endorsed signatures are genuine. If they do not show that the endorsement is not genuine, then the presumption is that it is a genuine endorsement. The quantum of proof is under section 9 of the Negotiable Instruments Act. The plaintiffs cannot presume forgery, they must show that the endorsement is a forgery [Fletcher J. Directly the plaintiff shows the notes were stolen, the onus shifts to you.] I have to show I was a holder in due course no doubt, and section 9 of the Negotiable Instruments Act protects me, if I deal with the matter in due course and pay full value.

Mr. B. C. Mitter (*Mr. Dunne* and *Mr. Mullick* with him) for the plaintiffs. The case of the *Bank of Bengal v. Mendes*. (1) is an express case in point. [Fletcher J. The words in section 9 'without having sufficient cause to believe that any defect existed' means, as in English law, without notice.] That is so, but section 58 shows that, once I prove the endorsement is fraudulent, the onus shifts to the defendant to show that he is a *boni fide* holder without notice. *Kennedy v. Thomas* (2), *Ganesdas Ramnarayan v. Lachminarayan* (3) and *Rai Bahadur Sahu Lalta Persud v. Charles Campbell* (4). This case is governed by section 118, clause 9 of the Negotiable Instruments Act. See also section 10. I am entitled to succeed in tort and in contract for the full amount at the rate of the conversion, and I claim to be entitled to compensation.

FLETCHER J. The plaintiffs, who are the executors of one Gouri Prosad Kundu deceased, seek by this suit to recover against the defendant, the Secretary of State for India in Council, the value of certain Government Promissory Notes of the face value of Rs. 48,000 under the circumstances hereafter stated.

The deceased Gouri Prosad Kundu, whose native village was Gopalbari in the District of Faridpur, had for some years

(1) (1880) I. L. R. 5 Calc. 654.

(3) (1894) I. L. R. 18 Bom. 570.

(2) [1894] 2 Q. B. 759.

(4) (1905) 9 C. W. N. 841.

prior to his decease carried on a rice business in the Suburbs of Calcutta.

The evidence is, and it is not disputed, that he was possessed of Government Promissory Notes of the face value of Rs. 56,000. These Government Notes were from time to time pledged with the firm of Roy of 55 Sova Bazar Street, Calcutta, for the purpose of raising money, when required, for the rice-business.

For the last eight years of his life-time the deceased Gouri Prosad Kundu had owing to declining health ceased to take any active part in the rice-business and had retired to his native village of Gopalbari.

There, on the 10th of May 1904, Gouri Prosad Kundu executed a registered will.

The evidence is, and there can be little doubt that it is true, that the deceased had his Government Promissory Notes with him at Gopalbari at the date he executed his registered will. In such will the deceased specifically refers to the Government Promissory Notes for Rs. 56,000, and it is in evidence that the Government Promissory Notes were taken out of the box, in which they were kept, for the purpose of taking the particulars thereof for insertion in the registered will.

Sometime between 8th and 11th May 1904, the deceased left Gopalbari and came to Calcutta for the purpose of undergoing medical treatment. He was accompanied to Calcutta by a niece, named Kankana, who has been called as a witness for the plaintiffs. The deceased, according to the evidence which I accept, brought with him to Calcutta the Government Promissory Notes for Rs. 56,000 and the registered will. A house in Calcutta had been hired for the deceased and there he remained until his death on the 22nd of August 1904. The deceased's health, when he came to Calcutta, was bad and he gradually grew worse and for sometime before his death his condition was such that he could not transact any business. It is common ground between the parties that on the 15th of June 1904, the deceased through his servants drew at the Public Debt Office the interest due on the Government Promissory

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Notes. This being so, it follows that any blank endorsements, which were on the notes for Rs. 56,000 at the date of the deceased's death, must have been placed thereon after the 15th June 1904, because the Public Debt Office will not pay interest on Government Promissory Notes, when they are endorsed in blank. The amount realised for interest on the Notes for Rs. 56,000 was at or about the time the interest was drawn invested by the deceased in the purchase of Government Promissory Notes of the face value of Rs. 5,000.

It is admitted by the plaintiffs that after the date on which the interest was drawn the deceased pledged Government Promissory Notes of the face value of Rs. 2,000 with the said firm of Roy to secure the advance of two sums of Rs. 900 each required for the purpose of the deceased's rice-business. These Notes were redeemed by the deceased on the 16th July 1904. It appears from the evidence that, whenever the deceased used to require money for the purpose of his business, he used to borrow it from the said firm of Roy on the pledge of his Government Promissory Notes. This is shown by the evidence of the cashier of the firm, who produces the books showing many transactions between his firm and the deceased. The only transaction between this firm and the deceased after the 15th June 1904 was the borrowing by the deceased of the two sums of Rs. 900 mentioned above. One of the witnesses for the defendant, who was formerly employed in the deceased's rice-business, stated in his evidence that the deceased used to borrow money on pledge of the Government Promissory Notes from firms other than the said firm Roy. This witness was, however, unable to state the names of any such other firm or the nature or amount of such transaction, and it would appear also that he was not on good terms with the plaintiffs.

The deceased, as I have already stated, died on the 22nd August 1904.

Accordingly I hold on the evidence that at the date of the deceased's death all the Government Promissory Notes for Rs. 56,000 and Rs. 5,000 were in his possession.

The deceased left him surviving his widow Hemanta Kumari and his said niece Kankana, who was trusted by the deceased in his affairs and was accustomed to keep the deceased's keys. The plaintiffs, who married two nieces of the deceased, are the executors named in his registered will. Shortly after the deceased's death the widow, Kankana and the plaintiffs returned to Gopalbari. They took with them the registered will and the Government Promissory Notes. At that time the widow and the plaintiffs appeared to have been on good terms. After their arrival at Gopalbari the servant of a creditor of the deceased's business named Khettermoni arrived and pressed for security for the debt that was owing to his mistress. According to the plaintiffs' evidence, which I accept, the box containing the Government Promissory Notes was produced and notes of the face value of Rs. 7,000 were made over as security for Khettermoni's debt. Now some of the notes that were made over as security for Khettermoni's debt bear no endorsement by the deceased. It is a not insignificant fact that, if all the remaining notes had been endorsed by the deceased in blank, that the parties should go out of their way to hand over notes as security to Khettermoni, which were not capable of being negotiated.

The relations between the widow and the plaintiffs then ceased to be friendly. The widow seems to have disapproved of the terms of the registered will.

A few days after the Pujahs in October 1904 there was a meeting of the agnates of the deceased's family and as part of the arrangement come to, it was decided that the Government Promissory Notes should be kept under two locks, the key of one should remain in the possession of Kankana and that of the other should be kept by the widow. On the 21st November 1904, the plaintiffs applied to the Court of the District Delegate of Faridpur for grant of probate of the registered will. This application was opposed by the widow.

The correspondence between the legal advisers of the plaintiffs and the Bank of Bengal, who manage the Public Debt Office on behalf of the Government of India, then commences.

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It will, however, be convenient before proceeding further to set out the rules framed by the Bank of Bengal with reference to the stoppage of Government Promissory Notes—such rules are as follows :—“ The stoppage of notes is effected by a written application addressed to the Public Debt Office containing a correct description of the loans, numbers and amounts of the notes to be stopped. The address of the applicant should also be given in full. On presentation at the Public Debt Office of any of the notes so stopped, notice of presentation is promptly given requiring the production of an order of a competent Court within ten days from the date of notice for the further detention of the notes by the Public Debt Office, failing which the stoppage is removed against the notes presented, which are then dealt with as though no stoppage had been entered against them.

“ In the case of notes stopped by residents in the mofusil or at any great distance from Calcutta, the period allowed for the requisite order of Court is extended to 15 or 20 days according to the circumstances. Steps should be taken to identify the presenter of a stopped note and his address should be registered in case of need.”

These rules approximate to the practice of the Bank of England and other public Companies in England with reference to distringas notices, and it cannot be doubted, if the Public Debt Office had acted in accordance with these rules, this case would never have arisen.

On the 25th November, a few days after the application for probate in the Court at Faridpur, the plaintiff's attorneys in Calcutta wrote to the Bank of Bengal a letter in the following terms :—

“ Estate Gouri Prosad Kundu deceased.”

“ The above named deceased died on the 22nd August last possessed of the following Government Promissory Notes and leaving a will, whereby he appointed our clients Babus Banku Behari Sikdar and Parmessur Sikdar executors. Our clients have applied for probate of the will and expect to obtain the same shortly. The deceased has not endorsed or transferred

the notes during his life-time. We are instructed to request you not to pay the interest on the notes to any one except our clients, who are the only persons rightfully entitled to receive the same."

The schedule to the letter sets out full particulars of the notes.

This letter appears to me to come clearly within the rules relating to stoppage of the notes. The Bank are informed first, of the death of the deceased and that the plaintiffs are the executors and then there is a request for the stoppage of payment of interest.

The Bank reply to that letter on the 26th November 1904 that they could not recognise the plaintiffs, until they produced probate of the will.

Again on the 7th December 1904, the plaintiffs' attorneys wrote a further letter to the Bank, in which they stated "the probate will be produced to you after it is obtained from Court. No one besides our clients have the right to deal with the Government Promissory Notes in question." On the same date, the 7th December 1904, the District Judge at Faridpur appointed Asutosh Maitra, who has been called as a witness in this case, to be administrator *pendente lite* of the estate of the deceased.

On the 9th December 1904, Asutosh Maitra went to Gopalbari to take possession of the estate of the deceased. On arriving there he was informed that the notes were in the custody of the widow and Kankana and was requested not to take possession of them as the parties hoped to come to a settlement.

The administrator *pendente lite* returned to Faridpur and reported the matter to the District Judge.

On the 14th or 15th December, the administrator *pendente lite* proceeded to Gopalbari for the second time.

The administrator *pendente lite* was there informed that the Government Promissory Notes had been removed by the widow. On the morning after his arrival he had an interview with the widow, who stated that an elderly female relative, one Chandamoni, had got possession of the notes. The administrator *pendente lite* sought out Chandamoni, who denied having possession of the notes. The plaintiffs' evidence as to the

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widow getting possession of the notes is as follows :—The day before the second visit of the administrator *pendente lite* the widow and Kankana had a quarrel over the custody of the notes, and in the course of this quarrel Kankana threw down her key of the box, in which the notes were kept, and, subsequently, the widow removed the notes to the quarters of Upendra Nath Kundu, who was one of the co-sharers in the house at Gopalbari. Having regard to the subsequent history of the notes I think this story is correct.

Early in January 1905, the widow propounded in this Court a document, which she stated to be the last will of the deceased.

The widow was examined on commission in those proceedings and in the course of her evidence she stated that the Government Promissory Notes were in her possession. On the 29th April 1905, an application was made in the High Court for the appointment of a Receiver. The widow filed an affidavit in opposition to that application, wherein she stated that she had pledged certain of the notes for necessaries and costs of the suit. On the 4th May 1905, the Official Receiver was appointed to be Receiver of the estate of the deceased.

The petition for probate in the High Court was subsequently dismissed, the Court holding the alleged will propounded by the widow to be a forgery.

It will now be convenient to trace the subsequent history (so far as it appears from the evidence) of the notes from the date they were removed by the widow in the middle of December 1904.

On the 13th March 1905, Upendra Nath Kundu (being the person to whose quarters the widow had removed the notes) pledged with the Bank of Bengal certain of the notes of the face value of Rs. 25,000 as security for an advance of Rs. 24,000.

On the 18th April 1905, Upendra Nath Kundu pledged a further parcel of the notes having a face value of Rs. 10,000 with the Bank of Bengal as security for an advance of Rs. 9,500.

On the 1st May 1905, Kedarnath, whom the evidence shows was connected with the widow, sold to the Bank of Bengal a further parcel of the notes having a face value of Rs. 11,000.

On the 29th May 1905, Upendra sold to the Bank of Bengal a further parcel of the notes of the face value of Rs. 2,000.

On the 21st June 1905, Upendra wrote to the Bank of Bengal requesting them to sell the pledged notes of the face value of Rs. 35,000. The Bank accordingly did so and paid the balance to Upendra.

Thus the Bank of Bengal acquired notes of the face value of Rs. 48,000 out of the notes for Rs. 61,000, which belonged to the deceased at his death. All these notes purport to be endorsed by the deceased. The Bank of Bengal presented the notes for Rs. 48,000 to the Public Debt Office and received in exchange in their own favour renewed notes for a similar amount.

The plaintiffs allege that these endorsements purporting to be made by the deceased are forgeries. The defendant denies this, and further says that, even if the endorsements purporting to be made by the deceased on the back of the notes are forgeries, yet the Bank of Bengal became "holders in due course" of the notes within the meaning of the Negotiable Instruments Act. Now Government Promissory Notes are payable to the order of the payee and therefore pass by endorsement and delivery only. (Section 46 of the Negotiable Instruments Act.)

A "holder in due course" is defined in section 9 of the Act as any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer or the payee or endorsee thereof, if payable to or to the order of a payee, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person, from whom he derived title.

But then the defendant says that under section 58 of the Negotiable Instruments Act, the Bank of Bengal, even if the signature of the deceased are forgeries, were "holders in due course," as they took the notes from some persons other than the deceased in good faith and for value.

In support of this proposition the defendant relies on the dictum of Stephen J. in *Chandra Kali Dabee v. E. P. Chapman* (1)

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With the greatest respect to the learned Judge I am unable to agree with his opinion that a person can claim title to a negotiable instrument through a forged endorsement. A forged endorsement is a nullity, and it must be taken as if no such endorsement was on the instrument. The judgment of Russell J. in the case of *Hunsraj Purnanand v. Ruttonji Walji* (1) commends itself to me. There does not appear to me to be any difference between the law in England and in India in this respect.

The defendant has also this further difficulty in his way with regard to a large number of the notes, namely, at the time the Bank of Bengal acquired the notes several of them had matured, and with respect to these the Bank could not be 'holders in due course' and could therefore only acquire the rights of their transferor (section 59 of the Negotiable Instruments Act). The real question is therefore whether or not the endorsements or the notes purporting to be those of the deceased are or are not genuine. Now on whom is the onus as to this issue.

In my opinion the onus is on the defendant with respect to the bills that had not matured. When once the plaintiffs have established, as I have held they have, that the widow obtained possession of these notes from the lawful owners by means of an offence or fraud, the onus of proving that the Bank became holders in due course lies on the defendant.

With respect to the notes that had matured the onus seems to me to be obviously on the defendant.

If that be so it is obvious that the evidence in this case falls far short of discharging that onus. But even if the onus were on the plaintiffs, I should hold that the plaintiffs have discharged that onus. There is first the fact that the notes were free from any endorsement on the day on which interest was drawn in June 1904. Secondly, I think the evidence establishes that after that date the notes, except the notes for Rs. 2,000, were not pledged with any one. The evidence on behalf of the plaintiffs further proves that the notes, except on the occasions when the notes for Rs. 2,000 were taken out of the box to raise the two

(1) (1899) I. L. R. 24 Bom. 65.

sums of Rs. 900 each, and when the box was taken out to restore these two notes on their redemption on the 16th July 1904, remained in the box until the deceased's death. There is also the important fact that some of the notes given to Khettermoni bore no endorsement, whereas one would have expected that, if some of the notes were blank endorsed notes without an endorsement by the deceased and therefore incapable of being negotiated, they would not have been given to Khettermoni.

In these circumstances I hold that the endorsements on the notes through which the Bank of Bengal claimed the notes are forgeries.

I must therefore enter judgment for the plaintiffs for a sum which at the present market price represents the value of Government Promissory Notes for Rs. 48,000.

With respect to the interest, which ought to have been received by the plaintiffs, unless the parties can agree upon the amount, I must direct a reference to ascertain this amount.

The defendant must pay to the plaintiffs their costs of this suit.

Attorney for the plaintiffs: *B. N. Bose & Co.*

Attorney for the defendants: *Eggar.*

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