PART – A : NEGOTIABLE INSTRUMENTS

Mohammad Akbar Khan v. *Attar Singh*

AIR 1936 PC 171

LORD ATKIN, J. - The suit was commenced by a plaint dated 25th July 1929, based upon a deposit receipt dated 1st April 1917, to recover the principal sum of Rs. 43,900 said to have been deposited with the defendants on deposit account with interest at the agreed rate of 5¼ per cent per annum. The alleged deposit receipt bore only an affixed stamp of 1 anna, and the Subordinate Judge in framing the issues stated as the first issue the question whether the document fell within the definition of a promissory note and was it therefore not admissible in evidence. Without hearing any evidence as to the circumstances in which the document came into existence he decided this issue as a preliminary point in favour of the defendants, holding that the document was a promissory note, was improperly stamped, and therefore, was inadmissible in evidence for any purpose under S. 35, Stamp Act. Their Lordships will discuss this decision later. Leave however was given to the plaintiff to amend; and on 2nd January 1931 the plaintiff presented an amended plaint alleging that on 1st April 1917, it was agreed between the plaintiff and the defendants that the plaintiff should deposit Rs. 43,900 with the defendants for a period of two years with interest at 5¼ per cent per annum: and that at the expiration of the two years the amount was allowed to remain in deposit with the defendants on the condition that the plaintiff would be at liberty to recover the amount with interest at any time he liked, and that interest would be credited annually in the books of the defendants. The defendants in their respective written statements denied that there was any agreement apart from that recorded in the inadmissible promissory note. They denied any agreement in 1919, they pleaded the Statute of Limitation and finally pleaded that they had repaid the money in 1919. Further issues were raised as to the liability of some of the defendants as members of the alleged joint Hindu family as members of which they were sued. As to these issues no question now arises before their Lordships. The Subordinate Judge does not appear to have thought it necessary to frame a new issue to meet the allegation in the amended pleadings of the agreement made in 1919. He heard the evidence on both sides and eventually gave judgment for the plaintiff. The plaintiff's evidence was that when his father died in 1914 he had Rs. 25,000 deposited with the defendants which he, the plaintiff, had withdrawn in 1914, and had afterwards re-deposited in 1916 while he was engaged in the war. On his return from the war in 1917 he wished to deposit with the defendants whom he knew to be a very reliable firm of money-lenders a further sum of Rupees 50,000. He sent for the two principal defendants, father and son, and told them he wished to deposit with them the sum named.

They said they could not take so large a sum and could invest only Rs. 43,900 in a certain business. They asked him not to fix the interest higher than 7 annas, i.e., 5¼ per cent per annum. (The interest on the Rs. 25,000 had been 6 per cent). "They said they could not repay me the money within two years: after that they would repay me at any time on demand after receiving due notice." He sent his accountant Abdulla with them to his regular bankers Duni Chand Hari Chand who conducted all his receipts and disbursements. Later Abdulla

handed him the receipt in question, which admittedly was prepared by the defendants. The plaintiff then proceeded to give evidence as to the 1919 transaction. He said that he was on duty as a martial law commander near Lahore in April 1919; and that on 21st April or 22nd on hearing of the death of his uncle he came home to Hoti on leave. While there the defendants, the father and possibly the son, came to him. They said that the two years had elapsed. "They asked what should be done about the money. I told them I did not then want to withdraw that money and would like to keep it with them as the times were uncertain. I told them to credit the interest and pay it to me when I wanted it. They agreed to this." Before the trial the defendant Hira Singh had died, a very old man.

The son Attar Singh said that in 1917 he had taken some land on mortgage from one Hamish Gul. He, Hamish Lal, had acquired the land by pre-emption and Rs. 42,500 had to be deposited as pre-emption money, which was found by the defendant, Attar Singh. He took a loan from the plaintiff for Rs. 43,900 at 5¼ per cent interest, wrote a promissory note for this and gave it to the plaintiff himself. No mention was made of the money being placed on deposit. He made no agreement with the plaintiff after the expiration of two years to keep the money on deposit. After two years he repaid the money and the interest. His father and he both went to the plaintiff and his father paid the money.

The defendants' story about the payment of the money was not accepted by either of the Courts in India. The absence of any receipt, the non-return of the alleged promissory note, and the failure by the defendants to produce any books dealing with the transaction amply support the finding of the trial Judge in this respect. The defence therefore had to rest upon the Limitation Act, a defence meritorious enough where the defendant has been left in long enjoyment of property: or where from the lapse of time the original existence or the discharge of an obligation is left in doubt but void of all merit where, as here, an original obligation is admitted and a fictitious discharge is falsely alleged. Nevertheless it must be carefully examined, and the plaintiff's rights determined accordingly. The articles of the Limitation Act which are relevant are:

> 59. For money lent under an agreement that it shall be payable on demand: Three years from the time when the loan was made.
>
> 60. For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable: Three years from the time when the demand is made.

To which should be added article

> 120. Suit for which no period of limitation is provided elsewhere than in this schedule; Six years from the time when the right to sue accrues.

It is therefore necessary to determine whether this was money lent by the plaintiff to the under defendant; or whether it was deposited under agreement that it should be payable on demand. An attempt was made by the plaintiff to establish that the money was deposited with the defendants as bankers payable on demand. The trial Judge accepted this view, but their Lordships are not prepared to differ from the Judicial Commissioner's Court in this respect. That the defendants were moneylenders is admitted, but there is no satisfactory evidence that they carried on business as bankers, or indeed how such business is carried on in the North-

West Frontier Province: and in the absence of such evidence it would be unsafe to affirm the trial Judge's finding. Was this then a loan or was it a deposit payable on demand? It should be remembered that the two terms are not mutually exclusive. A deposit of money is not confined to a bailment of specific currency to be returned in specie. As in the case of a deposit with a banker it does not necessarily involve the creation of a trust, but may involve only the creation of the relation of debtor and creditor, a loan under conditions. The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would therefore seem to be a normal condition of the obligation of the depositee to repay. It is unnecessary however in this case to decide any question as to implied conditions, for the case of the plaintiff rests on an express stipulation made in 1919.

Before however coming to a final decision as to the rights of the parties it seems necessary to discuss the point decided by the trial Judge that the document signed by the defendants in 1917 was a promissory note and inadmissible because improperly stamped. No objection to this ruling appears to have been taken on the hearing of the appeal: but their Lordships thought right to allow the point to be raised before them, as it involves no question of fact: on the other hand the determination of the issue as to whether any and what agreement was made in 1919 is much embarrassed by the Court having to deal with a fund as it were in vacuo, with no evidence admissible as to how there came to be any sum in the hands of the defendants at that date having heard the discussion their Lordships have come to the conclusion that the document was not a promissory note. The Indian Stamp Act does not suffer from the defect of the English Stamp Act in ignoring the definitions in the Bills of Exchange Act, 1882, and enacting a definition of its own. According to the Indian Act, "Promissory Note" means a promissory note as defined by the Negotiable Instruments Act, 1881. By the latter Act, S. 4(a) "promissory note" is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument. There follow illustrations lettered (a) to (h) of which three only need be set out.

A signs instruments in the following terms:

(a) I promise to pay *B* or order Rs. 500.
(b) I acknowledge myself to be indebted to *B* in Rs. 1,000 to be paid on demand, for value received.
(c) Mr. *B*. IOU Rs. 1,000.

The instruments respectively marked (a) and (b) are promissory notes. The instruments respectively marked (c) are not promissory notes. It is necessary to refer to S. 13:

> "A negotiable instrument means a promissory note... payable either to order or to bearer."
>
> *Explanation* – A promissory note ... is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not

convey words prohibiting transfer or indicating an intention, that it shall not be transferable.

The instrument in question in this case is according to the authorised translation in the following terms:

> May God protect us. This (one) receipt is hereby executed by Bhai Hira Singh Attar Singh Kharbanda, residents of Hoti, for Rupees 43,900 (forth three thousand and nine hundred rupees) half of which amount comes to twenty one thousand nine hundred fifty, received from the firm of Lala Duni Chand Lala Hari Chand Sethi for and on behalf of Captain Mahommad Akbar Khan of Hoti. This amount to be payable after 2 (two) years. Interest at the rate of Rs. 5-4-0 (Rs. five annas four) per cent per year to be charged. Dated this 20th day of Chetar (first month of Hindu Calendar year) Sambat 1974, corresponding to 1st April 1917. Stamp has been duly affixed
>
> *(Sd.) Hira Singh, Kharbanda.* *(Sd.) Attar Singh, Kharbanda.*

If this document is otherwise within the definition of a promissory note, it would seem that it must be negotiable, for there appear to be no words prohibiting transfer or indicating an intention that it should not be transferable. It must be admitted that it would be a somewhat unusual visitor in the accustomed circles of negotiable paper. It is indeed doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice; for the third illustration indicates that an IOU is not a promissory note, though of the implied promise to pay there can be no doubt. The second illustration however seems to show that the express words "I promise" or "I undertake" are unnecessary. The form of words is taken from an early English case, reported in ***Casborne* v. *Dutton***, [Selwyn's N. P. 11th Ed. p. 401] where according to the learned author the Court stated that the words "to be paid" in the document there sued on amounted to a promise to pay, observing that the same words in a lease would amount to a covenant to pay rent. It does not appear to form a useful general illustration except in the case of a document in that particular form of words.

Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid. It is not without significance that the defendants who drew it, and who were experienced money lenders, did not draw it on paper with an impressed stamp as they would have had to if the document were a promissory note, and that they affixed a stamp which is sufficient if the document is a simple receipt. Being primarily a receipt even if coupled with a promise to pay it is not a promissory note. It will have the effect of overruling some decisions in the Indian Courts notably the case of ***Manick Chand* v. *Jomoona Doss***

[(1880) 8 Cal 645], where the defendant had given a sale note to his customer recording a resale to him of certain rupee paper previously bought from the customer, and bringing out a difference expressed to be payable on a day in the next month. The document was a sale note coupled with an account, and in no way resembled a promissory note, or anything capable of being a negotiable instrument. Once it is decided that the document has not to be stamped as a promissory note, their Lordships are not called upon to decide whether the document otherwise bears a sufficient stamp. If that question had been raised it is sufficient to say that if improperly stamped it could have been stamped after execution under a penalty.

The further objection to the admissibility of the document was that it recorded the terms of a contract reduced to the form of this document, and that under Ss. 91 and 92. Evidence Act, no oral evidence was admissible to contradict, vary, add to, or subtract from its terms. The answer is that the document does not record or purport to record all the terms of the contract between the parties. There is nothing in the document which explains how the money came to be received: and nothing to prevent the parties from showing that it was paid by way of loan, deposit, or on account of some joint adventure. The use of the money might have been limited in various ways. The only terms which the document does express are as to the date of repayment of the money expressed to be received and as to the rate of interest. These terms the defendants do not now seek to contradict, vary, add to or subtract from. The Board therefore can proceed to examine the evidence untrammeled by the restriction imposed upon themselves unnecessarily as now appears by the Courts below of having to disregard the receipt or evidence as to the actual transaction in 1917. Their Lordships see no reason for rejecting the plaintiff's evidence as to this which seem to be supported by evidence as to a former and, as he says, similar transaction entered into by both his father and himself as to Rs. 25,000. But it has to be remembered that the transaction in 1917 assuming it to have been a deposit was not a deposit payable on demand. The receipt shows that it was payable after the expiration of two years. Without deciding the point their Lordships prefer to assume that the evidence given by the plaintiff that it was also stipulated in 1917 that if not paid in two years it was to remain payable on demand should be rejected as inconsistent with the express terms of the document: and they are not prepared to find that there was an implied term that it should be so payable.

The real question in the case is whether there was any agreement made in 1919 and if so whether the plaintiff has established the agreement alleged by him. The outstanding fact is that after 1919 no interest was in fact paid nor was any claim made to have the principal repaid until at the earliest 1925. Obviously some explanation is required. The defendants supplied a plain tale. The principal and interest were repaid at the due date. This unfortunately is untrue. The plaintiff's explanation is the alleged agreement in 1919 that the money and interest were to remain on deposit with the defendants payable on demand. It is uncontradicted save by a story which is shown to be false. In these circumstances it would appear that the real question for the tribunal of fact is whether there are inherent improbabilities or extrinsic facts justifying the Court in rejecting the plaintiff's account. Their Lordships do not find that there are. The Court of the Judicial Commissioner quite rightly commented upon the fact that three witnesses were called on the plaintiff's behalf at an early stage of the trial to support the agreements in 1917 and 1919, as alleged in the

statement of claim a different set of three for each transaction. One of the last three obviously confused the story of 1919 with that of 1917: the evidence of all six has been treated as unreliable; and their Lordships do not dissent from this view.

The plaintiff must suffer the necessary disadvantage which attaches to any party who seeks to support his case in a Court of justice with unreliable evidence. And if it could be shown that he knowingly suborned false witnesses there could be no doubt as to the result of his claim. But no evidence nor any cross-examination was directed against the plaintiff in this respect, and in his evidence he makes no reference to corroborative witnesses being present. It was considered in the judgment under appeal that the fact that the plaintiff in 1925 demanded payment of the debt of Rs. 25,000, which bore a rate of interest of 6 per cent per annum without demanding payment of the present debt which only bore a rate of 5¼ per cent, threw some doubt on the plaintiff's case.

Again the plaintiff was not asked about this and it would not be difficult to suggest reasons why a creditor might be willing to leave a larger sum outstanding even at a lower rate of interest if he were not dissatisfied with the credit of his debtor. It seems also to be overlooked that the difficulty, if difficulty there be, applies equally to the only other alternative view that there was a loan outstanding but that it was not payable on demand. That some arrangement was made at the end of 1919 accounting for the non-payment at the stipulated date and in succeeding years seems certain. In the careful judgment given on appeal the Court says:

> Probably something did happen on the expiry of two years originally fixed, but what it exactly was we have no means of ascertaining on this record. There is something which neither party is willing to disclose.

But the explanation given by the plaintiff is consistent with all the facts: the only counter-explanation was payment, which was false: no other explanation was suggested to the plaintiff who was surely entitled to have an opportunity of meeting it if it is to be used against him. In all the circumstances of this case their Lordships come to the conclusion that there was no ground for reversing the decision of the trial Judge in favour of the plaintiff. The appeal should be allowed except as against defendants 2 and 3 and the decree of the Court of the Judicial Commissioner dated 27th June 1932, should be set aside: and the decree of the Subordinate Judge dated 15th October 1931, should be restored. The appeal should be dismissed against the defendants 2 and 3 with costs and those defendants should also have their costs of the appeal against them in the Court of the Judicial Commissioner. The appellant should have the costs of the appeal against the other defendants here and in the Court of the Judicial Commissioner. Their Lordships will humbly advise His Majesty accordingly.

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Ponnuswami Chettiar v. *P. Vellaimuthu Chettiar*

AIR 1957 Mad. 355

PANCHAPAKESA AYYAR J. - This petition raises an interesting question of law not exactly covered by any ruling. The main point of law is *whether the absence of the name of the payee in a promissory note will make the note invalid, though the payee was known with certainty even at execution*. The facts are briefly these: It was a suit brought against the petitioner by one Vallaimuthu Chettiar for the recovery of Rs. 1177-8-0, the principal and the interest due on a promissory note, dated 16-11-1950, for Rs. 1000.

Two defences were raised by the petitioner in the lower courts. One was that the promissory note was not supported by consideration. The lower courts found that the promissory note was fully supported by consideration, and Mr. B. V. Viswanatha Aiyar, learned counsel for the petitioner, was not able to shake that finding which is in my opinion quite correct.

2. The next plea was that the promissory note was not executed in favour of a known and certain person and, so, would be invalid. Mr. B.V. Viswanatha Aiyar urged vehemently before me that a promissory note in favour of a person without his name being mentioned in it should be held to be totally invalid and inoperative, even though full consideration might have passed, and the person lending was known with precision even at the time of execution by the person borrowing, and though the description in the context, could refer only to him.

The description of the payee in the suit promissory note was "son of Palaniandi Chettiar." He was certainly that. But there are also three other sons of Palaniandi Chettiar, according to the plaintiff, though they never lent a pie to the petitioner and had not come into the picture at all. I think the law is not so wooden as to allow this kind of quibbling by a debtor in a desperate attempt somehow to escape his just liability.

If really the lender was not known, and if Rs. 1000 had been brought by a maid-servant or other servant from the house of Palaniandi Chettiar and handed over to the petitioner with the statement that a son of Palaniandi Chettiar had lend him this Rs. 1000, and the petitioner had honestly been ignorant as to who the lender was, and had executed a promissory note in favour of a son of Palaniandi then the case might be at least arguable that Palaniandi had four sons and that the petitioner had executed the suit note without knowing or seeing the particular son who lend him the Rs. 1000, and so the promissory note would fail as the payee was not certain.

But here "the son of Palaniandi" who lent the money was the plaintiff Vallamuthu Chettiar, who swore to it, and it was not alleged by the borrower, the defendant, that any of the other three sons of Palaniandi had lent him a pie out of the amount in that pronote. The other three sons were far away, and had nothing to do with the petitioner or this promissory note.

Though the name of the plaintiff was not mentioned (perhaps by sheer slip or accident), the lender and borrower knew it, and there was the description. To say that the name must always be mentioned to make a promissory note valid is, in my opinion, not sustainable in any modern court of justice, equity and good conscience, though such a plea might have been

allowed in a court, like the old Anglo-saxon Courts, deciding on outworn formulae without reference to living facts.

Many a Hindu woman will not name her husband, but to say from that that she has no husband will be absurd. Many a man is known by his caste or village or official name, or surname, like Mudaliar, Ayyar or Rao, Ambedkar, Gandhi, Nehru, Kirloskar, Prime Minister, Rajah of Sandur, etc., and not by his personal name.

To say that hundreds of Raos Mudaliars Ayyars, Gandhis, Nehrus etc., might have been the persons who lent the money, when the particular man who has lent the money is known, even at that time beyond all doubt to the lender and the borrower is in my opinion, disingenious and meaningless. The Hindu law givers and Mimamsakas have said, 2000 years ago, that "I" cannot be made into "O" or "O" into "I", by any amount of quibbling, and that arguments will not avail to show that there is no gooseberry on the palm when it is there.

So too, no amount of quibbling can change the fact that this particular promissory note was executed by the petitioner in favour of the plaintiff, that particular son of Palaniandi. This defence had been raised only because the defence of "no consideration" collapsed. The plaintiff swore that he was the man who lent, and the defendant would not swear that the plaintiff was not the man who was mentioned in the promissory note as the lender.

The description in the promissory note is, no doubt, a little defective because because of the failure to mention the rank of the plaintiff among Palaniandi's sons like "first son of Palaniandi" etc. But the evidence (which can be let in in such cases to clear the pretended, but not real, ambiguity) shows that the parties knew even then with certainty that the lender was the plaintiff, and no other son of Palaniandi.

Section 96 of the Indian Evidence Act will apply, as held by the learned Judges at the new trial and evidence regarding the name could be let in in such cases. The ruling in ***Abdul Hakim Ear Mahomed* v. *Ebrahim Solaiman Salehjee and Co***. [AIR 1921 Cal 480], shows this. In this view, the civil revision petition has no merits, and is dismissed.

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Nanga v. *Dhannalal*

AIR 1962 Raj. 68

C.B. BHARGAVA, J. - This appeal arises out of a suit for recovery of the amount due under an instrument which was held to be inadmissible in evidence by the learned Munsif, Gangapur, holding that it was a promissory note and was insufficiently stamped. The document in question was executed on 5th December, 1951 and according to the law then in force it required a stamp of -/5/- whereas it bore a stamp of -/4/- only.

2. The learned Munsif having found that the document which was the basis of the suit, was inadmissible in evidence dismissed the plaintiff's suit.

3. The plaintiffs preferred an appeal against the judgment and decree of the learned Munsif to the court of the Civil Judge, Gangapur. The learned Civil Judge, Gangapur held that the provisions of section 35 of the Stamp Act related to procedural law and therefore, the admissibility of the document should be determined according to the Stamp Law which is in force on the date the document is sought to be tendered in evidence and not according to the law in force at the time of its execution. As the admissibility of the document came in for consideration on 2nd November 1957, and on that date the Stamp duty required was -/4/- he held that it was properly stamped and was admissible in evidence. He, therefore, allowed the plaintiffs' appeal and sent the case back for decision on merits. The defendants have now come to this Court against the above order of the learned Civil Judge.

When the matter came up before the Division Bench it was pointed out that the decisions of this court on the question whether the order of the court holding that the document is admissible in evidence amounts to admitting the document in evidence within the meaning of the provisions of section 36 of the Stamp Act are conflicting. A contrary view was taken in ***Gordhan Singh* v. *Suwa Lal*** [AIR 1959 Raj 156], where the learned Judge held that:

> "A document can only be said to be admitted in evidence when it is formally proved and tendered in evidence."

5. It is of course unfortunate that the previous decision of this Court in AIR 1954 Raj 173 and some other cases on the point were not brought to the notice of the learned Judges who decided ***Gordhan Singh*** case.

6. I may observe at the very outset that the view taken by the learned Civil Judge is not correct. The proper amount of duty required for an instrument to be determined according to the law in force at the time of the execution of the instrument and not when it is tendered in evidence. The learned Civil Judge was in error in holding that the law in force at the time when the admissibility of the document is called in question will govern the case. Section 35 of the Stamp Act provides that:

> "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, or authenticated by any such person or by any public officer, unless such instrument is duly stamped."

The words "chargeable and duly stamped" used in this section have been defined in the Act in sections 2(6) and 2(11). 'Chargeable' means, as applied to an instrument executed or first executed after the commencement of this Act. 'Duly stamped' as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in India.

7. It would thus be clear from the aforesaid definitions that the question whether an instrument is duly stamped must be determined with reference to the law in force at the time when the instrument is executed because it is under such law that it is chargeable with duty.

8. However, the learned counsel for the respondents has raised a preliminary objection that the document has been 'admitted in evidence' within the meaning of section 36 of the Stamp Act by the order of the learned Civil Judge and therefore, it is no longer open to this Court to go behind that order even though that order may be wrong because the learned counsel concedes that the view taken by the learned Civil Judge is not sustainable in law.

The question therefore, for determination is whether the order of the learned Civil Judge in holding that the document is admissible in evidence amounts to this that the document has been 'admitted in evidence' and this Court is now precluded from examining this question.

9. Learned counsel for the appellants urges that the document cannot be said to be admitted in evidence unless it is formally proved and tendered in evidence. According to him it should become a part of the record before it can be said to be admitted in evidence. In the present case it is urged that the order of the court only amounts to a declaration that the document is admissible in evidence. But in fact it has not been admitted in evidence and has not become a part of the record so long as it was not proved and endorsement was made on it according to the provisions of Order XIII Rule 4 of the Code of Civil Procedure.

In ***Ratan Lal*** case, the document was held inadmissible by the trial court and the suit was dismissed. An appeal was filed to the District Judge which was also dismissed. In second appeal a learned Single Judge of this Court held that the document did not require any stamp at all. He admitted the document and sent the case back for retrial on merits. Under S. 18(2) of the Rajasthan High Court Ordinance special appeal was filed against the decision of the learned Single Judge and a preliminary objection was raised that as the document has been admitted in evidence by the learned Single Judge it cannot be called in question at any stage of the suit or proceeding. It was held that:

> "Although it is necessary that the courts should strictly follow the provisions of O.XIII, R. 4, C.P.C. and make the required endorsements on the documents admitted in evidence, that has nothing to do with the question whether the document has been admitted in evidence or not. That depends upon the order of the court, and if there is an order of the court admitting the document, the endorsement under O. XIII, R. 4 is merely the following up of that order.
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> Where, therefore, a document is held by a court to be admissible in evidence on the ground that it requires no stamp or on the ground that stamp on it is sufficient, the document must be deemed to be admitted in evidence on the day the order is passed and S. 36 of the Stamp Act will come into operation."

In ***Gordhan Singh*** case, a preliminary issue was framed by the trial court as to whether the instrument amounted to a promissory note. The trial court held that it was not a promissory note but was an agreement and ordered that duty and penalty should be paid on it. Against this order a revision was filed in the High Court and a preliminary objection was taken that the duty and penalty having been paid on the document it should be deemed to have been admitted in evidence within the meaning of S. 36 of the Stamp Act and such a document cannot be called in question in the revision application.

It was held that

> "the document has not been formally proved and tendered in evidence as no evidence has yet been recorded. A document can only be said to be admitted in evidence when it is formally proved and tendered in evidence. There are two stages relating to documents filed in court. One is the stage when all the documents are filed by the parties in court. The next stage is when the documents are formally proved and tendered in evidence. It is after the document is formally proved that the endorsement referred in R. 4 of O. XIII of the Code of Civil Procedure is to be made. We accordingly find that the preliminary objection has no force."

It would thus appear that those decisions fully support the rival contentions of the parties. It would also be useful here to cite some other cases of this Court on this question. In ***Jahangir Khan* v. *Zahur*** [AIR 1952 Raj 123], it was held by a Division Bench of this Court that:

> "Where, therefore, the trial court, held a document not to be a pro-note but an agreement and held it admissible on payment of deficit stamp duty which was paid and the objecting party filed the revision contending that the lower court was wrong in not holding the document to be a pro-note, it was held that S. 36 of the Jaipur Stamp Act clearly barred the petitioner from re-agitating this question in revision and the promptness with which the objector has raised the point in revision is no consideration for ignoring the clear provisions of S. 36 of the Stamp Act."

It was held that

> "As the plaintiff has paid the deficit stamp duty, the document should be considered to have been admitted into evidence by the lower court and we are of opinion that Sec. 36 bars the petitioner from re-agitating this question in revision."

It may be observed that the document in this case was not formally proved or tendered in evidence and the revision was filed no sooner the order was made by the lower court. In ***Moon Lal* v. *Sampat Lal.*** [ILR (1952) 2 Raj 1010] it was held that:

> "Where a court finds that a document is not a promissory note and is admissible on payment of duty and penalty, and thereafter the party pays the duty and penalty, the document will be deemed to have been admitted in evidence and, in view of S. 36 of the Stamp Act, the finding of the court cannot be challenged in revision."

It was urged in ***Jahangir Khan*** case, that if the above view of the law was to be accepted then the decision of the trial court will be final in such matters and the High Court will have no opportunity of revising that decision and the learned Chief Justice in the course of the

judgment suggested a method by which it will be possible for the High Court to revise such orders; i.e., that as soon as an order like the one in revision is passed, the party, against which it is passed, should immediately make an application in writing to the court that it intends moving the High Court in revision, and ask for a reasonable time, say one month or six weeks, to be granted to it to do so. It should also pray to the court that in the meantime duty and penalty should not be realized. If a revision is filed within the time allowed, the party should pray to the High Court for an order for stay of proceedings in the court below. Thus by the time the revision comes up for decision before this Court, the document would not be admitted in evidence, because duty and penalty would not have been paid upon it.

Learned counsel for the appellants contends that these observations run counter to the view taken in ***Ratan Lal*** case, to which the Hon'ble Chief Justice was himself a party and mean that the mere order of the court holding a document to be admissible is not sufficient in cases where penalty and duty is required to be paid. To this question whether there is any distinction in such cases where the court holds a document to be admissible in evidence as either requiring no stamp or being sufficiently stamped and where it holds that the document is admissible on payment of duty and penalty, I shall advert to later on.

At present the point for consideration is whether once the question regarding the admissibility of a document on the ground whether it is sufficiently stamped or not has been judicially determined by a court, can that question be agitated again either before the same court or before the superior courts in appeal or revision? The answer to this question will depend upon the meaning of the words 'admitted in evidence' used in S. 36 of the Stamp Act which runs as follows:

> "Where an instrument has been admitted in evidence such admission shall not except as provided in Sec. 62, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

Section 36 of the Indian Stamp Act embodies the same principle and should be construed in that context the question of admissibility of a document in evidence is to be considered once and is considered as final and not open to question because the rights of the parties are not affected by it and the decision only affects the interest of the Government revenue for which ample provision has been made under Section 61 of the Stamp Act which provides for revising of the decisions of the subordinate courts regarding the sufficiency of stamp duty paid on the instruments. It is not to be judged from party's point of view that his right to approach the higher courts is taken away if this interpretation of law is adopted.

As pointed out the above Section 36 has not been enacted for protecting the rights of the parties but in the interests of the Government revenue. When the object in enacting this section is only to protect the interest of the Government revenue and that interest is amply safeguarded by the provisions contained in Section 61 then where a court passes an order that the document does not require any stamp or is duly stamped the order should be treated as final. The order removes the impediment from the way of the party from formally proving the document. All that the court is required is to determine whether the document can be let in evidence and if it holds that the document is admissible and can be let in evidence there is the end of the matter. It is admission of the document for the purposes of Section 36 of the Stamp

Act. To say that despite the order holding the document as admissible in revenue it cannot be considered to be 'admitted in evidence' for the purposes of Section 36 of the Stamp Act, till it is formally proved, would be giving too narrow interpretation to the words used in the section keeping in view the principle underlying the provision.

Suppose a document is tendered in evidence by a party and an objection is raised by the other side regarding its admissibility on the ground that it is not sufficiently stamped and the court judicially determines that question and decides that the document is admissible and postpones the case for formal proof of the document, or say that the court while deciding the question of admissibility passes an order that the document is admitted in evidence or further also makes an endorsement as required by Order XIII Rule 4 of the Code of Civil Procedure and still postpones the case for formal proof of the document, can it be said in all these cases that the document has not been admitted in evidence as it has not been formally proved? To my mind there is no distinction in either case and the order in each case is equivalent to the admission of the document and the question regarding the admissibility of the document becomes final and the provisions of Order XIII Rule 3 of the Code of Civil Procedure cannot come into play, so as to reopen that question. Keeping in view the object underlying this provision I am of opinion that when the court has determined the question that the document does not require any stamp or is sufficiently stamped and holds the document admissible in evidence, it should be deemed to be admitted in evidence for the purposes of Section 36 of the Stamp Act even though the document has not been formally proved. Express or implied decision of the court which is involved in every case of admission of a document should receive greater consideration than the mere mechanised process which follows it.

The view taken in ***Gordhan Singh*** case, that even though the document is held to be admissible in evidence by the trial court and deficit duty and penalty has been paid it cannot be considered to be admitted in evidence, to my mind with all respects does not seem to be correct. It is true that the mere production of the document does not amount to its admission in evidence, but to hold further that even the order of the court holding it to be admissible does not amount to admitting the document in evidence for the purpose of Section 36 of the Stamp Act will be taking a too narrow view of the term 'admitted in evidence.'

A similar question came up for consideration in ***Mangal Sain* v. *Gobind Das*** [139 Pun Re 1840], where the first court held the instrument sued upon to be promissory note insufficiently stamped and inadmissible in evidence on payment of duty. The court of appeal held the instrument not a promissory note, and admissible in evidence on payment of duty, as an agreement. In second appeal it was held that the instrument having been admitted in evidence, the admission cannot be called in question.

12. Before I conclude I may point out with the greatest respect that the distinction pointed out in ***Moon Lal*** case, does not appear to be on any sound principle. If the court holds that the document is admissible in evidence on payment of duty and penalty that order too should be final and not open to challenge in revision irrespective of whether the duty and penalty has been paid or not. The order means that the document is not one of that class which cannot be admitted in evidence even after payment of duty and penalty. The preliminary objection should therefore, prevail and the appeal should be rejected on this ground alone; but since the question with regard to the nature of the document has been argued at length before this

Court. I propose to deal with that question also and decide whether the instrument is a promissory note or not.

13. The document in question is on a page of the creditors account book and is written in Hindi. Translated into English it reads, thus:

> "Account of Badri son of Loharia and Jhunta son of Deva Patel by caste Kharwal resident of Amarpur Hatim dated Magsur Sudi Smt. 2008 corresponding to 5th December, 1951. Interest at the rate of Re. 1/- per cent, p.m.
>
> Rs. 1300/- in cash in words (Rupees thirteen hundred). British Coin, borrowed from Pannalal Phulchand Munim, Gangapur. This amount is payable on demand. Shall pay this money to Pannalal Phulchand Munim of Gangapur with interest whenever he shall demand it.
>
> *Left hand thumb impressions of Badri, Jhunta of Lakhan Two two annas stamp*
>
> Whatever is recorded above is correct. After taking the money we have put our thumb impressions. By the pen of Birdhichand scribe at the instance of Badri and Jhunta."

15. Promissory note has been defined in Section 2(22) of the Stamp Act as under:

> 'Promissory note' means a promissory note as defined by the Negotiable Instruments Act, 1881:
>
> "It also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen."

16. Though the definition of a promissory note for stamp purposes is wider than the definition given in Section 4 of the Negotiable Instruments Act, yet to fall within this extended definition it should be a promissory note in all respects save for the contingency affecting the payment in the ordinary mercantile sense.

17. Learned counsel for the appellant contends that the document in question contains all the attributes of a promissory note. According to him it contains an unconditional undertaking to pay a certain sum of money to a certain person and is signed by its maker. However, learned counsel for the respondent urges that it is not a promissory note because the parties never intended to create one at the time of its execution. He says that the maker of the document is an illiterate villager, ignorant of usages of merchants and traders who in their dealings generally execute such instruments. He further says that the document has been executed in the account book of the plaintiff which shows that the parties did not intend to create a negotiable instrument which generally a promissory note ought to be.

Learned counsel for the appellant contends that a promissory note need not be negotiable according to the aforesaid definition. According to him both under the Negotiable Instruments Act and the Stamp Act there can be promissory notes which may not be negotiable. Therefore, to insist that before a document may be held a promissory note it should be intended to be negotiable would not be in consonance with its definition as given in the said Act. The test of negotiability, learned counsel, urges, should not be applied in determining the nature of the instrument because it is not warranted by the definition clause.

If the requisites mentioned in the definition are satisfied then the instrument must be held a promissory note regardless of the fact that it may or may not be negotiable.

19. More than once this question was raised before this Court in more or less the same form and after reviewing the case law on the subject it was held in ***Chiranji Lal*** case, AIR 1953 Raj 211 that:

> "The intention of the parties at the time of execution of a document is to be looked into in order to find out whether it is a promissory note or not. It is necessary to look into the terms of the document and the surrounding circumstances to see whether it was intended to be a promissory note. Merely because it contains a promise to pay would not necessarily make it a promissory note."

Again in ***Gordhan Singh*** case, it was held that:

> "In order that a document may fall within the definition of 'promissory note' contained in the Negotiable Instruments Act, it is necessary that (i) there should be an unconditional undertaking to pay, (ii) the sum should be a sum of money and should be certain, (iii) the payment should be to or to the order of a person, who is certain, or to the bearer of the instrument, and (iv) the maker should sign it. Besides fulfilling the above terms, the instrument must pass three further tests, viz., (1) the promise to pay must be the substance of the instrument (2) there must be nothing else inconsistent with the character of the instrument as substantially a promise to pay and (3) the instrument must be intended by the parties to be a promissory note.
>
> It is a question of fact in each case whether a particular document is to be regarded as an acknowledgment or promise, and in order to decide the question, the primary intention of the parties and the real characteristics of the document must be looked into.
>
> There is a distinction between an intention to negotiate an instrument and an intention to create an instrument, which can be negotiated. It is rarely that in actual practice, one comes across a promissory note, which has been negotiated. But such promissory notes are frequently created with the intention of creating a document to which the presumption under S. 118 of the Negotiable Instruments Act might apply so that a suit for recovery of money may be based on it."

20. In ***Raghunath Prasad*** case, AIR 1960 Raj 20, to which one of us was a party it was held:

> "The definition of 'promissory note' in S. 2(22) of the Stamp Act must be construed in the light of the definition of 'Promissory note' in the Negotiable Instruments Act. By virtue of the definition of a 'negotiable instrument' contained in S. 13, a promissory note payable to order or to bearer is a negotiable instrument. If the document on the face of it is of such a nature that it could not have been intended to be negotiable, such a document cannot be a promissory note. Where the document was executed in a bahi and could not be taken out of it without tearing the leaf and could not be transferred in order to be negotiated within the meaning of S. 14, the document could not be a promissory note within the meaning of the Negotiable Instruments Act.

> No doubt under the inclusive part of S. 2(22) of the Stamp Act certain non-negotiable documents are included within the definition of 'promissory note' in the Stamp Act. It may become non-negotiable if the conditions falling under the inclusive part of the definition in S. 2(22) have been added to it but otherwise it must fulfil all the tests of being a promissory note as laid down in the Negotiable Instruments Act."

21. It will thus appear that the first two cases do not go to the length of clearly laying down that an instrument in order to be a promissory note must also be a negotiable instrument unless it falls within the wide definition of 'promissory note' as given in the Stamp Act but the learned Judges who decided those cases only pointed out that besides the other requirement the instrument must be intended by the parties to be a promissory note which is a question of fact in each case and should be decided by looking into the primary intention of the parties and the real characteristic of the document. The third case, however, directly decides the question which has been raised before us.

23. The Negotiable Instruments Act which defines a promissory note which has been adopted by the Stamp Act also was enacted for the benefit of trade and commerce and the principle underlying it is that pronotes, bills of exchange and cheques should be negotiated as apparent on their face without reference to secret title to them. The Act deals only with three classes of negotiable instruments which are in common use. Therefore, in order to determine whether the instrument is a promissory note or not it should also be kept in view whether it would be a promissory note in the common acceptation of men of business or persons among whom it is commonly used. In other words it should be a promissory note in the popular sense of the term also.

24. In several English cases the same view has been expressed and the language under the Indian law and English law is almost the same. A promissory note under Section 83(1) of the Bills of Exchange Act 1882 has been defined as:

> "A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer."

Under section 33(1) of the Stamp Act of 1891 it has been defined thus:-

> "For the purposes of this Act the expression 'promissory note' includes any document or writing (except a bank note) containing a promise to pay any sum of money."

Sec. 33(2): A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed a promissory note for that sum of money.

(24a) It was observed by Pollock, J. in ***Mortgage Insurance Corporation, Limited* v. *Commrs. of Inland Revenue*** [(1888) 20 QBD 645] that:

> "The question is, what is the dominant, the substantial effect of the instrument? In this respect the prior decisions assist me in forming a conclusion. The Courts

have said that in order to determine the question two things must be inquired into what is the intention of the parties, and what is the instrument in the common acceptation of men of business or persons among whom it is commonly used. The two cases referred to in argument give authority for applying those tests. It is unfortunate, I think, that in a statute dealing with revenue matters natural terms have been enlarged so as to create a sort of legislative document other and different to the document which is commonly known by the term used. In the section we have to construe here the legislature have taken a term of well-known meaning, and have then said it is to mean something else."

"Bills of exchange or promissory notes are always prima facie negotiable. They may however, contain words prohibiting transfer or indicating an intention that they should not be transferable." (**Halsbury's *Laws of England,*** Third Edition, p. 161).

25. Under Sec. 13(1) of the Negotiable Instruments Act a promissory note payable either to order or to bearer is a negotiable instrument. Under Explanation (1) of that section, a promissory note is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person and does not contain words prohibiting transfer or indicating an intention that it shall be transferable.

It is, therefore, clear that even if a promissory note is payable to a particular person it will be deemed to be payable to order and will be negotiable instrument under the Negotiable Instruments Act unless expressly or by implication its transfer is prohibited. Therefore, looking to the definition of the promissory note in the Stamp Act as well as in the Negotiable Instruments Act, it seems that a promissory note should, in its popular sense as understood by men of business, be negotiable. The only exception which the Stamp Act provides is that it need not be negotiable in cases where it falls within the wider definition as given in that act. If it does not fall within the wider definition of the Stamp Act, then under the Negotiable Instruments Act it need not be negotiable in those cases only where expressly or by implication it is not transferable. In all other cases a promissory note should stand the test of negotiability. There can be promissory notes which may not be negotiable but such notes can only be those which fall within the above mentioned exceptions. Barring these exceptions, if they are intended to be promissory notes they should be negotiable.

This conclusion also flows from the two Privy Council cases viz. ***Mohammad Akbar Khan*** case [AIR 1936 PC 171] and ***Karam Chand*** case [AIR 1938 PC 121]. In the first case their Lordships in the light of the definition of the promissory note as given in the Stamp Act observed:

"If this document is otherwise within the definition of a promissory note, it would seem that it must be negotiable, for there appear to be no words prohibiting transfer or indicating an intention that it should not be transferable. It must be admitted that it would be a somewhat unusual visitor in the accustomed circles of negotiable paper."

Their Lordships further observed that:

"They prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to

documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide."

26. The instrument in that case was not held to be a promissory note on the ground that it did not contain an undertaking to pay but because it did not stand the test of negotiability.

27. In the second case of AIR 1938 PC 121, the documents were in the following terms and contained all the attributes of a promissory note.

"Received from you this 5 day of Asuj 1986, Sambat corresponding to 20th September, 1929, a cheque for Rs. 10,000 drawn by you on Messrs. Grindlay and Co., Ltd Peshawar. The amount would be repaid with interest thereon at the rate of Rs. 11-4-0 p.c. Time ten months. The principal amount will be paid with interest after ten months from this date."

"Received from you this 23rd of Asuj, Sambat corresponding to 8th October, 1929, cheque No. 50284 dated 8th October, for Rs. 10,000 drawn on the Imperial Bank of India, Limited, Peshawar. The amount to be paid back with interest at the rate of Rs. 11-4-0 p.c. after ten months.

This principal amount with interest thereon to be repaid after ten months from this date."

But their Lordships thought that they were not promissory notes because they were never intended to be negotiable instruments.

28. Their Lordships were fully alive as has been observed in that judgment that

"There was a strong current of authority in India to the effect that documents of this character containing a promise to pay (and it could hardly be contended that those under consideration did not contain such a promise) came within the ban of S. 35 Stamp Act"

But were pleased to point out that:

"Since the judgment of the Judicial Commissioner's Court, a decision of this Board, ***Mohammad Akbar Khan*** case, AIR 1931 PC 171, has made it clear that the shadow resting upon these exhibits throughout the case was unreal; that documents of this nature which were clearly never intended to be negotiable instruments at all are not promissory notes and are not therefore, for want of a stamp, inadmissible in evidence."

"If this decision had been before the learned Judicial Commissioners, their Lordships doubt if they would have come to the conclusion they did."

29. This judgment of their Lordships of the Privy Council makes the position still clearer that an instrument although containing a condition undertaking to pay money must also be intended to be a negotiable instrument before it could be held a promissory note.

30. I am therefore of the view that a promissory note besides fulfilling the requirements as laid down in Section 4 of the Negotiable Instruments Act must also be intended by the parties at the time of its execution to be a promissory note as understood by commercial persons in its popular sense which means that unless it falls within the exception provided in the wider definition of the Stamp Act, or is otherwise expressly or by implication made not transferable, it must be intended by the parties to be negotiable instrument. If the instrument does not fall within the above mentioned exceptions and does not stand the test of negotiability, it will not be a promissory note even though it contains an unconditional undertaking to pay money.

31. Now applying these tests to the present document I find that:

1. the maker of this document is an illiterate villager ignorant of the mercantile custom and usage and probably may not have even heard of promissory notes.

2. the document is not in the form in which promissory notes are generally written by the mercantile community. On the other hand it is in the form in which moneylenders keep accounts of their customers in their account books.

3. it is contained on a page of an account book where there is also an account of another person.

32. Having regard to these features I am inclined to hold that the parties never intended to create a promissory note as understood in its popular sense. Merely because they affixed a stamp of -/4/- which was the requisite stamp duty before the amendment of the Jaipur Stamp Law it cannot be inferred that they intended to create a promissory note. Generally promissory notes are not executed in account books of the nature which has been produced before us in this case. I accordingly, hold that the document is not a promissory note and is an agreement and is admissible in evidence on payment of duty and penalty.

33. In view of my findings I dismiss this appeal.

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Ashok Yeshwant Badeve **v.** *Surendra Madhavrao Nighojakar*

(2001) 3 SCC 726 : AIR 2001 SC 1315

B.N. AGRAWAL, J. - 9. The concept of post-dated cheque was well known even in common law and it was in effect a bill of exchange payable on demand with a post-date upon which the demand was to be made. As far back as in 1776 and while the Law of Merchant was then in the process of formation, it was held in ***Da Silva* v. *Fuller*** [Sel Ca 238 MS] referred to in **Chitty on *Bills of Exchange***, 11th Edn., (188) that a banker was not justified in paying a post-dated cheque before its actual date. In 1868 nearly a hundred years later, the Court of Queen's Bench in ***Emanuel* v. *Robarts*** [(1868) 9 B & S 121] observed that a banker was justified in refusing payment of a post-dated cheque before its due date and that the custom of banker to do so was a part of the contract between the banker and the customer. In ***Bull* v. *O'Sullivan*** [LR 6 QB 209], the Court laid down that a post-dated cheque payable to order was an instrument payable to order on demand on its date. Later, in 1877 in ***Gatty* v. *Fry*** [(1877) 2 Ex D 265] the Court held that a post-dated cheque is not payable on the day it is issued but on the day of its date. All these cases were decided before the law was codified in England by the Bills of Exchange Act, 1882. After passing of the aforesaid Act, in ***Palme 6 Palmer, Re, ex p Richdale*** [(1882) 19 Ch.D. 409], it has been decided by the Court of Appeal that a post-dated cheque was equivalent to a bill of exchange payable on a future date, namely, the date of the cheque. In ***Hinchcliffe* v. *Ballarat Banking Co.*** [1870 1 VR (L) 229] the Court determined the exact point in question in the present case against the bank, holding that a post-dated cheque is a bill of exchange payable at a future date and that the banker may be liable to an action by the customer for negligence if he pays such cheque before the day it bears date.

10. In the high authority of ***Royal Bank of Scotland* v. *Tottenham*** [(1894) 71 LT 168], similar question was the subject-matter of consideration before the Court of Appeal in which Lord Esher, M.R., after due consideration observed thus:

> "A cheque is a contract between the parties, and it is for a Judge at the trial to construe that contract by reading what is written upon it. Reading this cheque, upon its face it is dated the 10th of August, and is payable to order. What is the true construction of that contract upon reading it? It is simply an order to pay £ 250 upon demand. It is said that this is not the proper construction under the circumstances, because the cheque was signed on the 3rd of August, and handed over to the payee on the 8th of August, being dated the 10th of August. It is said that the cheque was, therefore, a post-dated cheque. Upon those facts being proved before the Judge, what ought he to do? Must he say that, in construing this written document, because it was handed over before the day of the date written upon it, he must put a different construction upon it and say that it is not a bill payable upon demand, but a bill payable two days after the day of its issue or negotiation? I have never heard of a cheque being so construed, and the argument of the appellant is entirely fallacious.... It is not denied that, by the Bills of Exchange Act, 1882, a post-dated cheque is not made invalid;.... The objection as to post-dating a cheque is therefore now an obsolete and useless objection. If a cheque is dealt with as a bill of exchange before

the date which it bears, then it becomes a bill of exchange in the ordinary sense; but it is not in any way an escrow. All the defences and objections are futile and must fail."

14. In **Halsbury's *Laws of England***, 4th Edn. (Reissue) Vol. 3(1), at p. 143, procedure to be adopted by the bank in relation to post-dated cheque has been enumerated which reads thus:

"Post-dated cheques are not invalid, but the banker should not pay such a cheque if presented before the date it bears. If, therefore, a cheque dated on a Sunday is presented on the previous business day, it should be returned with the answer 'post-dated'. A post-dated cheque, however, if presented at or after its ostensible date, should be paid though the banker knows it to be post-dated, and even if it has been presented before the date and refused payment."

15. In **Chalmers & Guest on *Bills of Exchange, Cheques and Promissory Notes***, 15th Edn., at p. 74, the concept of "post-dated cheques" has been explained as under:

"Post-dated cheques. - Cheques are often issued post-dated, that is to say, bearing a date later than that on which they are in fact issued. The purpose of issuing a post-dated cheque is to prevent the drawee banker from paying the cheque to the payee or a holder before the date written on the cheque. It is clear that the instrument is a cheque once the date written on it arrives. But its status is unclear prior to that date. It is arguable that, between the date of its issue and the date written on the cheque, it is not payable on demand and so cannot be a cheque but an instrument of a different kind. The view has been expressed that: 'so far as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days' date as intervene between the day of delivering the cheque and the date marked upon the cheque'. It has also been stated that the effect of issuing a post-dated cheque is equivalent to giving a promissory note not payable until the date written on the cheque."

16. In **Thomson's *Dictionary of Banking***, 12th Edn., p. 463 "post-dated" has been defined as follows:

"Post-dated.- A cheque which is dated subsequent to the actual date on which it is drawn, and which is issued before the date it bears, is called a post-dated cheque.

A post-dated cheque should not be paid before the date appearing thereon....

A cheque presented for payment before the date has arrived should be returned marked 'post-dated' "

17. F.E. Perry in ***The Law and Practice Relating to Banking* : *1***, at pp. 137 and 138 has dealt with "post-dated cheque" as under:

"A cheque must not be post-dated, that is, dated after the day on which it is presented for payment to the drawee branch. Post-dated cheques present far more difficulties to the banker than antedated cheques: There are practical difficulties rather than legal ones..... But a cheque is generally post-dated because the drawer

does not expect to have the funds to meet it until that date arrives. It is a mandate to the banker to the effect that it should not be paid before that date arrives."

18. In ***Jiwanlal Achariya* v. *Rameshwarlal Agarwalla*** [AIR 1967 SC 1118] a cheque dated 25-2-1954 was delivered on 4-2-1954 and encashed soon after 25-2-1954. This Court was considering the question of payment envisaged within the meaning of Section 20 of the Indian Limitation Act, 1908 and delivering the majority judgment, Wanchoo, J.observed thus:

> "Where, therefore, the payment is by cheque and is conditional, the mere delivery of the cheque on a particular date does not mean that the payment was made on that date unless the cheque was accepted as unconditional payment. Where the cheque is not accepted as an unconditional payment, it can only be treated as a conditional payment. In such a case the payment for purposes of Section 20 would be the date on which the cheque would be actually payable at the earliest, assuming that it will be honoured….. As the payment was conditional it would only be good when the cheque is presented on the date it bears, namely, 25-2-1954 and is honoured. The earliest date, therefore, on which the respondent could have realised the cheque which he had received as conditional payment on 4-2-1954 was 25-2-1954 if he had presented it on that date and it had been honoured."

19. From a bare perusal of Sections 5 and 6 of the Act it would appear that a bill of exchange is a negotiable instrument in writing containing an instruction to a third party to pay a stated sum of money at a designated future date or on demand. On the other hand, a "cheque" is a bill of exchange drawn on a bank by the holder of an account payable on demand. Under Section 6 of the Act a "cheque" is also a bill of exchange but it is drawn on a banker and payable on demand. A bill of exchange even though drawn on a banker, if it is not payable on demand, it is not a cheque. A "post-dated cheque" is not payable till the date which is shown thereon arrives and will become cheque on the said date and prior to that date the same remains bill of exchange.

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Lachmi Chand v. *Madanlal Khemka*

AIR 1947 All. 52

WALI ULLAH, J. – This is an appeal by the defendants against the decree passed by the learned Civil Judge decreeing the claim due on the basis of a promissory note dated 25-8-1928. The suit was instituted by B. Madan Lal Khemka as Secretary of Baba Kali Kamliwala Panchaiti Kshetra, Rishikesh, a registered society under Act 21 of 1860. The two defendants impleaded were Lala Lachmi Chand and his son, Onkar Prasad. As mentioned above, the suit was decreed against the defendants, both of whom filed an appeal in this Court. Lala Lachhmi Chand died during the pendency of the appeal leaving his son Onkar Prasad, appellant 2, as his sole legal representative. The position, therefore, is that Onkar Prasad is the sole appellant in this case.

2. The case set out in the plaint was to this effect. A pro-note was executed by Lala Lachhmi Chand, defedant 1, on 25-3-1928 for a sum of Rs. 10,000. The rate of interest stipulated was 12 annas per cent per mensem. It was in favour of Shri 108 Baba Kali Kamliwala Ramnath Maniramji of Rishikesh. On 28-7-1930 a sum of Rs. 4800 was paid by defendant 1 through one Mt. Draupadi. On 25-8-1932 a fresh pro-note was executed in renewal of the previous pro-note by both Lala Lachhmi Chand and Onkar Prasad for a sum of Rs. 8363 the total amount then found due. On 5-11-1934 another pro-note by way of renewal was executed for Rs. 9887-43. It was executed by Lala Lachhmi Chand alone. In November 1937 another pro-note is said to have been executed in respect of the amount found due on the previous pro-note and handed over to the creditor. Along with this pro-note a letter (Ex. 5) dated 3-11-1937 acknowledging the liability for payment of Rs. 12,024-1-6 then due was sent over the signatures of both Lala Lachhmi Chand and Onkar Prasad. Lastly, on 14-11-1939 a pro-note was executed by both Lachhmi Chand and Onkar Prasad for a sum of Rs. 13,302-11-9. This purported to be by way of renewal of the pre-existing liability under the former pro-note. The plaint was filed on 4-11-1942 with the allegations set out above and it was specifically stated in para. 7 of the plaint that the cause of action for the suit arose on 25-8-1928, the date of the original transaction, and it was stated that limitation was saved by reason of the subsequent acknowledgment in the form of pro-notes executed from time to time by the defendants in favour of the plaintiff.

3. The defendants resisted the suit on various grounds. Of them the most material pleas were these: (i) The suit was misconceived inasmuch as the plaintiff was not a payee under the pro-note of 1928 and consequently was not entitled to sue under the provisions of the Negotiable Instruments Act; (ii) that the cause of action on the basis of the pro-note of 1928, as set out in the plaint, did not exist; and (iii) that in any event, the defendants were "agriculturists" and as such entitled to the benefit of the Agriculturists' Relief Act in the matter of reduction of interest and the grant of instalments. It may be mentioned here in passing that the plaintiff admitted that the defendants were agriculturists. It is also a matter of admission that both the defendants were members of a joint Hindu family and Lachhmi Chand was the Karta of that family.

4. The facts, as set out in the plaint, were substantially admitted. The defendants led no oral evidence while the plaintiff contented himself with the production of one single witness

Bishambhar Sahai, the Karinda of the plaintiff. Bishambhar Sahai produced the plaintiff's Bahi Khata from Sambat 1995 to Sambat 1998. His evidence was to the effect that the plaintiff's accounts were kept regularly and defendants, accounts were sent to them regularly. His evidence was also intended to prove that all the loans advanced by Baba Ramnath Maniramji were actually advanced by the Kshetra Kali Kamliwala which was the real creditor. The documentary evidence in the case consists of various pro-notes executed from time to time and the correspondence exchanged between the parties as well as the statement of the defendants' accounts as they stood in the Bahi Khatas of the plaintiff.

5. The learned Civil Judge, on a consideration of the materials on the record, came to the conclusion that the defendants were "agriculturists" but that the plaintiff was not a "creditor" within the meaning of S. 32, Agriculturists' Relief Act. On the main question, whether the plaintiff was debarred from suing on the pro-note dated 25-8-1928, the learned Civil Judge seems to have missed the real point which had to be decided. He came to the conclusion, to quote his own words, that "there was no legal defect in the plaint" and in view of the renewals of the original loan he held that the suit was within limitation. In view of the findings recorded by him, he decreed the claim with costs and *pendente lite* and future interest at 3 per cent per annum payable by monthly instalments of Rs. 500 each, first instalment falling due on 1-9-1943. On failure to pay any of those instalments the whole amount due was directed to be recoverable at one.

6. Learned counsel for the appellant has strongly contended that the plaintiff not being the "payee" of the pro-note could not, by reason of S. 78 read with S. 8, Negotiable Instruments Act, successfully enforce the liability of the defendants under the pro-note. We have heard learned counsel for the parties at great length on this question. Our attention has been invited to a large number of rulings both of this Court as well as of other High Courts. The relevant provisions of the Negotiable Instruments Act are contained in Ss. 8 and 78 of the Act.

7. Reading the two sections together it is clear that the person to whom the payment should be made in order to discharge the maker or the acceptor from all liability under the instrument is the "holder" of the instrument or his accredited agent, such as a banker acting as an agent for collection. The "holder" of a promissory note is essentially the person who *"entitled in his own name."* The words "*entitled in his own name"* are obviously most significant. The legislature appears to have clearly intended to prevent any one from claiming the rights of a "holder" under the Act on the grounds that the ostensible holder is a mere name-lender. The term "*holder"*, therefore, does not include a person who, though in possession of the instrument, has not the right to recover the amount due thereon from the parties thereto. The principle enshrined in S. 78 of the Act is clearly in accordance with the basic principle underlying the law relating to negotiable instruments, viz., that the doctrine of *benami* will introduce an element of uncertainty greatly hampering the free circulation of negotiable instruments. The Negotiable Instruments Act has been enacted for encouraging trade and commerce and the underlying principle undoubtedly is that promissory notes, bills of exchange, and cheques should be negotiated *as apparent on their face* without reference to the secret title to them. It is for this reason that the provisions of S. 78 provide that in order to discharge the maker or acceptor from liability payment must be made to the "payee" or the

"holder" of the instrument. Section 48 of the Act provides for the negotiation of a promissory note by the holder by means of an endorsement and delivery. The effect of such endorsement and delivery is to transfer to the endorsee the property in the note with a right to negotiate it still further. It would appear, therefore, that the property, or ownership, in a promissory note including the right to recover the amount due thereon is vested by statute in the holder of the note. The express words of s. 78 no doubt do not negative a right of suit but the effect of allowing a suit by any one except the payee or the holder of the note would necessarily be to put the maker or the acceptor of the instrument in a most difficult situation. As has been said, a person so circumstanced is liable to be shot at twice: once by the person who is the "real" holder and then again by the person who is the "holder" within the meaning of the Negotiable Instruments Act.

8. Under the general law, a principal can institute a suit to enforce a contract entered into by his agent though his name is not disclosed but S. 78, Negotiable Instruments Act, clearly implies that there is an exception to the general rule so far as negotiable instruments are concerned. There are numerous cases in the reports and quite a number of them have been brought to our notice in the course of arguments by the learned counsel in which S. 78 of the Act has been strictly construed, and it has been held that a valid discharge can be given to the maker or acceptor of the instrument only by the payee of the note or the holder thereof. It has further been clearly laid down that there is no such thing for this purpose as a benami promissory note taken in the name of one person but really meant for the benefit of another. Where a hand-note is executed in favour of a benamidar it is not open to the promisor to assert that the holder of the note is not the beneficial owner. Conversely, if a suit is to be based upon the hand-note it must be instituted by the holder whose name appears on the note and not by any person who alleges that the original holder is his benamidar and that he is the beneficial owner. It was observed by their Lordships of the Privy Council in ***Sadasukh Janki Das*** [AIR 1918 PC 146] that:

> "It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or *on the back of the document,* so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand ...It is not sufficient that the principal's name should be "in some way" disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bills."

With reference to the contention based on Ss. 26, 27 and 28 of the Negotiable Instruments Act, their Lordships observed:

> "These sections contain nothing inconsistent with the principles already enunciated, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appear as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

9. As a corollary to the general rule above indicated, it has been held that the "real" creditor, as distinguished from the payee or the holder of the instrument, cannot be allowed to fall back upon the original consideration and to sue for the money advanced by him independently of the promissory note by proving the actual loan. On the contrary, obviously with a view to moderate the rigour of the general rule above indicated, it has been held in a number of cases that section 78 does not in reality deal with a right of suit and looking to the language of section 78 that is obviously correct. It has accordingly been held that the real owner is entitled to sue *provided* he is in a position to obtain a good discharge from liability from the maker or acceptor of the instrument. The fact that a person who is not the holder of the instrument cannot claim the privileges of a "holder", so it has been held, does not disentitle him from suing. Thus, in a suit brought by the "real" creditor to which the maker and the holder of the promissory note were parties a decree was passed against the maker with a proviso that payment shall be made to the real creditor only on his securing a valid discharge of the maker from the holder of the note. The contention that the real creditor, the holder of the promissory note being his benamidar, is precluded from maintaining a suit for enforcement of the liability incurred by the maker under the pro-note was repelled. With the utmost respect to the two learned Judges, we must say we find ourselves in full agreement with their views.

10. As must have been noticed from the discussion and the decisions in the cases above referred to judicial opinion on the question whether a suit lies at the instance of the real holder as distinguished from the payee or the endorsee of a promissory note is far from unanimous. The broader view, however, which has been accepted in some of the cases appeals to us as the one more in consonance with the dictates of justice and fairplay. It must, however, be carefully noted that in all these cases, with the exception of the Nagpur case, the "holder" of the note was himself a party to the suit. In the Nagpur case, however, the promissory notes in question were in favour of Khudai Dad Khan and not in favour of the firm of partnership that had instituted the suit. In that case Khudai Dad Khan does not appear to have been impleaded as a party but he had entered the witness box and was evidently agreeable to the decree being passed in favour of the plaintiff (the partnership). Under those circumstances the decree in favour of the firm was maintained provided the firm obtained within one month from the date of the decision a proper discharge from Khudai Dad Khan exonerating the defendant from all liability to him under the pro-note.

11. Reverting to the facts of the present case we find that the pro-note dated 25-8-1928 as also the pro-notes executed subsequently by the defendants were all in favour of Shri 108 Baba Kali Kamliwala Ramnath Maniramji or Rishikesh, that is to say, in favour of an individual person, namely, Ramnath Maniramji of Rishikesh. It is true that in the pro-note dated 5-11-1934 Baba Ramnath Maniramji is described as "the owner and manager of the Kshetra Baba Kali Kamliwala" but that cannot be of any help to the plaintiff-respondent in this case. It is beyond dispute therefore that the original pro-note as well as the pro-notes executed subsequently were in favour of Ramnath Maniramji Maharaj, may be that he was the owner and manager of what became a registered society as Baba Kali Kamliwal Panchaiti Kshetra, Rishikesh, in the year 1932 – we are informed that the society was registered on 4-1-1932 – but that fact, in our judgment, cannot make any real difference. The position,

therefore, is that the suit has been instituted in the name of a registered body and the payee of the promissory note in question is not a party to the suit. During the course of the hearing of this appeal we were informed by the learned counsel that Ramnath Maniramji Maharaj was dead. Beyond this statement of the learned counsel for the respondent, however, there is no other indication in the record as to whether he is dead or alive and also, if he died when he died and whether he left any heir and who that heir is. From the unrebutted evidence of Bishambhar Sahai, the *Karinda* of the plaintiff respondent, it appears that the consideration of the pro-note in question may very possibly have come out of the funds of the Kshetra Baba Kali Kamliwala, the registered society, but in the present case we find it impossible to hold that the plaintiff (the registered society) was (while the suit was pending in the Court below) or is even now in a position to secure a discharge of the defendant from all liability under the pro-note in suit. We are, therefore, constrained to hold that the present case does not fall even within the scope of the "*broader principle*" referred to above, this view of the matter, the contention of the learned counsel for the appellant must be accepted. It follows, therefore, that the suit be instituted by the plaintiff-respondent could not succeed.

12. In the result, therefore, this appeal may be allowed, the decree of the Court below set aside and the suit filed by the plaintiff-respondent dismissed.

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Singheshwar Mandal v. *Smt. Gita Devi*

AIR 1975 Pat. 81

H.L. AGRAWAL, J. – A money suit was filed against him by the plaintiff-respondent for recovery of a sum of Rs. 1541/15/- annas on the basis of a handnote admittedly executed by him on 4.7.1959 for a sum of Rs. 1133/11/- annas in favour of Dhir Narain Chand, the father of the plaintiff. It has been stated in the plaint, inter alia, that the plaintiff's father had expressed his desire in presence of the defendant second party that the amount in respect of this loan would go to the plaintiff alone to which the defendant second party expressly consented. The defendant second party are the two widows of Dhir Narain Chand aforesaid.

2. Defendant No. 1 filed a written statement and contested the suit on various grounds, inter alia, that the plaintiff being not the holder of the handnote in question, she had no right to institute the suit in question. As it is only this question that is falling for my consideration, it is not necessary to advert to any other defence put forward on behalf of the defendant. The trial court; accepted the defence and dismissed the suit but on appeal, however, the learned Additional Subordinate Judge has decreed the same and, therefore, this second appeal has been filed by defendant No. 1. The learned Additional Subordinate Judge has overcome this plea of the appellant on the ground that the plaintiff was an heir of Dhir Narain Chand who had every right to make arrangement and partition the assets among his heirs. On referring to the evidence and the circumstances on record, he has held that the plaintiff's father did make such an arrangement according to which this debt was made realisable by the plaintiff alone.

3. In my opinion, the court of appeal below has committed an apparent error of law in decreeing the suit. Under the provisions of Section 78 of the Negotiable Instruments Act, payment of the amount due on a promissory note etc. in order to discharge the maker or acceptor thereof must be made to the holder of the instrument or if the same is endorsed then to the endorsee as provided under Section 82(c) of the Act which is not the case here. The provisions of the Negotiable Instruments Act are very specific.

4. Admittedly in this case the handnote in question is not indorsed in favour of the plaintiff nor does the recital in any way indicate the intention of the creditor for the payment of the ultimate dues by the debtor to the plaintiff. The term "Holder" has been defined in Section 8 of the Negotiable Instruments Act, according to which the holder of a promissory note, inter alia, means a person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Admittedly, therefore, the plaintiff does not answer any of the descriptions mentioned above and the defendant was not bound to make the payment to her of the dues in question and as such the plaintiff has no right to institute the suit. It is not a case either of any transfer of this debt or claim which under the provisions of the Transfer of Property Act would be an "actionable claim" by the father to the plaintiff. In view of the provisions of Section 130 of the Transfer of Property Act the transfer of an actionable claim has to be effected; only by the execution of an instrument in writing signed by the transferor or his duly authorised agent and only thereafter the rights and remedies of the transferor is to vest in the transferee. The learned Additional Subordinate Judge, therefore, was not right in referring to any other mode of supposed arrangement by the father of the plaintiff and the different members of the family which did not answer this

requirement of law. Reference may be made to a decision of the Calcutta High Court in ***Harkishore Barua* v. *Guru Mia Chowdhry*** [AIR 1931 Cal 387]. As the provisions of the enactments referred to above themselves are clear, it is not necessary to cite any further authority in support of my views.

5. I would accordingly allow this appeal, set aside the judgment and decree of the court of appeal below and restore the order of dismissal of the suit passed by the trial court.

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Nunna Gopalan **v.** *Vuppuluri Lakshminarasamma*

AIR 1940 Mad. 631

LEACH, C. J. – On 10th December 1933 the respondent executed a promissory note in favour of one Maddipati Tattabayi, alias Tata, defendant 2 in the suit out of which this petition arises. The respondent says that she paid the amount due on the promissory note two days later, but the instrument was left in the hands of the payee, who the next day endorsed it to the petitioner. The petitioner instituted a suit on the promissory note in the Court of the District Munsif of Kovvur. The District Munsif passed a decree against the respondent and the payee. The respondent then appealed to the Subordinate Judge of Ellore, who confirmed the decree so far as it affected the payee, but dismissed the suit so far as it concerned the respondent. The Subordinate Judge held that the petitioner was a holder in due course, but inasmuch as the respondent had paid the amount due on the promissory note to the payee he was not entitled to recover from the respondent. The petitioner filed a second appeal, but as the amount involved was less that Rs. 500 the appeal did not lie. My learned brother Krishnaswami Ayyangar, however, allowed the appeal to be treated as an application for revision under S. 115, Civil P. C., and the case has been placed before this Bench for decision.

The opinion of the Subordinate Judge that the petitioner was not entitled to recover is contrary to the provisions of the Negotiable Instruments Act. S. 9 of the Act states that the term "holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorsee, if payable to order, 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 his title. S. 22 says that the maturity of a promissory note or bill of exchange is the date at which it falls due. It is to be observed that in the case of a promissory note which is payable on demand, (as in this case) it does not become payable until demand is made. On demand being made it falls due immediately. S. 60 provides that a negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction by the maker, drawee or acceptor at or after maturity, but not "after such payment or satisfaction." "Such payment" means at or after maturity. S. 118 says that until the contrary is proved it shall be presumed that every transfer of a negotiable instrument was made before its maturity, and that the holder of a negotiable instrument is a holder in due course. In this case, there is no evidence of any demand having been made on the respondent before she paid the amount to the payee of the instrument and it must therefore be taken that the endorsement to the petitioner took place before maturity. According to the sections of the Act to which reference has been made the petitioner is clearly entitled to recover from the maker.

In ***Glasscock* v. *Balls*** [(1890) 24 QBD 13], the Court of appeal had to consider the position of a person who was a holder of a promissory note in these circumstances. The payee of the instrument had taken from the maker a further security for the same amount in the shape of a mortgage. The payee transferred the mortgage to another person, receiving on the transfer the amount of the debt. Subsequently the payee endorsed the promissory note which

remained in his hands to the plaintiff for value, the plaintiff having no knowledge of the circumstances. It was held that the note, not having been paid or returned to the maker, was still current at the time of the endorsement, and the plaintiff as a bonafide endorsee for value was entitled to recover upon it. Lord Esher said:

> In this case the plaintiff sues the maker of a promissory note payable on demand as endorsee. It was admitted that the plaintiff was endorsee of the note for value without notice of anything that had occurred. The plaintiff cannot be said to have taken the note when overdue, because it was not shown that payment was ever applied for, and the cases show that such a note is not to be treated as overdue merely because it is payable on demand and bears date some time back. If a negotiable instrument remains current, even though it has been paid, there is nothing to prevent a person to whom it has been endorsed for value without knowledge that it has been paid from suing.

That is the position here. The principle laid down in ***Lickbarrow* v. *Mason*** (1787) 2 TR 63, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it, has also direct application. The respondent had discharged the promissory note on 12th December 1933, but it was endorsed to the petitioner without knowledge of this fact the next day and the respondent as the maker of the note should have insisted on its return to her when she paid the amount. She did not do so and as she left the instrument in the hands of the payee and thus gave him an opportunity to commit a fraud she must suffer in preference to the petitioner. In this connexion I may point out that S. 81, Negotiable Instruments Act, provides that any person liable to pay, and called upon by the holder thereof to pay, the amount due on a promissory note, is before payment entitled to have it shown, and is on payment entitled to have it delivered up to him, or, if the instrument is lost or cannot be produced, to be indemnified against any further claim thereon against him. The respondent, having paid the promissory note without insisting on its return to her or without obtaining from the payee a guarantee, acted at her own risk.

In ***Muthureddi* v. *Velu Asari*** [AIR 1917 Mad 886], Seshagiri Ayyar J., held that the maker of a promissory note could not plead against a holder in due course that he had paid the money to the payee before the indorsement, and relied on the decision in ***Nash* v. *De Freville*** [(1900) 2 QB 72]. The only dissentient note is that struck by Pandalai J., in ***Venkanna* v. *Subbayya*** [AIR 1933 Mad 300], on which the respondent relies. There the facts were these. A promissory note was executed by *A* in favour of *B*, but the note came into the possession of his wife and her nephew who refused to give it up to *B*. As the result *B* asked *A* to give him a fresh promissory note, which *A* did. The new promissory note was subsequently negotiated by *B*. Eventually *A* paid the amount due on the promissory note to the endorsee. After *B's* death his wife negotiated the original promissory note and the endorsee called upon *A* for payment. Liability was denied by *A* and Pandalai J. accepted his defence. This decision is clearly wrong. Apart from the provisions of the Negotiable Instruments Act the principle in ***Lickbarrow* v. *Mason*** [(1787) 2 TR 63], applied. The maker of the promissory note gave of his own free will a new promissory note without insisting on the return of the original instrument or obtaining an indemnity. Had he obtained an indemnity it would not of course have precluded the plaintiff from recovering from him, but if he had taken a proper indemnity

would have safeguarded his position. ***Venkanna* v. *Subbayya*** [AIR 1933 Mad 300], was wrongly decided and cannot be allowed to stand.

It follows that the petition must be allowed and the decision of the Subordinate Judge so far as it exonerated the respondent must be set aside. The decree of the District Munsif will therefore be restored in its entirety.

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S.D. Asirvatham **v.** *G. Palniraju Mudaliar*

AIR 1973 Mad. 439

ISMAIL, J. – The defendants are the appellants, executed a promissory note dated 6-4-1960, for a sum of Rs. 5,000 payable with interest at 12 per cent per annum in favour of one Peter Manickam. The said Peter Manickam endorsed the promissory note in favour of the respondent herein on 10-9-1964. It is on the basis of this endorsement, the respondent herein instituted the suit against the appellants for recovery of Rs. 6,800 made up of the principal of Rs. 5,000 and interest of Rs. 1,800 due under the promissory note but prayed for a decree only against the first appellant-first defendant. In his written statement, the first appellant contended that the respondent herein was not a holder in due course under law, since there was no notice of transfer and that the respondent had knowledge of the partial discharge of the suit promissory note to the extent of Rs. 3,000 on 7-8-1961, even before the transfer, and that consequently the claim of the respondent for the whole of the suit promissory note instead of only claiming the balance of Rs. 2,000 was prima facie fraudulent and collusive. He further contended that the respondent who was abetting the original payee in all the transactions knew about all the facts stated above and that the assignment of the suit promissory note in his favour was not a bona fide transfer and was a fraudulent and collusive one. The second appellant herein filed a separate written statement in which she also contended that the appellants had paid Rs. 3,000 to the original promisee on 7-8-1961, that the original promisee, as his usual custom, did not allow the first appellant to endorse the payment of this sum of Rs. 3,000 paid towards the principal amount under the suit promissory note and the same was ignored, that the original promisee has not given due credit for this payment of Rs. 3,000 and had fraudulently transferred the suit promissory note in favour of the respondent and that to a notice sent to the original promisee demanding him to give credit for the same, there was no reply. The further case of the second appellant was that the respondent was not a holder in due course and that the assignment of the suit promissory note in his favour was not bona fide, as it was vitiated by and that there was also no notice of assignment or demand from the respondent to the appellant herein.

2. The learned VII Assistant Judge who tried the suit framed the following issues:-

1. Whether the plaintiff is not a bonafide holder in due course?
2. Whether the principal amount of the suit promissory note was partially discharged by the defendant by payment of Rs. 3,000 on 7-8-1961 apart from payment of interest upto 27-9-1961 to the original payee?
3. Is the suit liable to be dismissed against the second defendant?
4. To what amount if any the plaintiff is entitled?

On issue No. 2, the learned Assistant Judge accepted the case of the appellants herein that a sum of Rs. 3,000 was paid by the first appellant to the original payee, namely, P.W. 1 under the promissory note on 7-8-1961. On issue No. 1, he held that the appellants had not established that the respondent herein was not a bona fide holder in due course. On issue No. 3 he held that the appellants had jointly executed the suit promissory note and were jointly and severally liable and therefore the respondent was entitled to pray for a decree only against the first appellant and that on that ground it could not be held that the suit was liable to be

dismissed as against the second appellant. In view of these findings, he decreed the suit as prayed for. Hence, the present appeal by the defendants in the suit.

3. The only point urged by the learned counsel for the appellants is that the suit promissory note had matured on the date of the endorsement by the original payee in favour of the respondent herein, namely, on 10-9-1964 that consequently Section 59 of the Negotiable Instruments Act, 1881 hereinafter referred to as the Act applied to the facts of this case and that therefore the respondent herein was entitled to claim only the balance of the amount due under the promissory note, after giving credit for the sum of Rs. 3,000 paid by the first appellant to the original payee, and not the full amount for which the promissory note was executed. The factual basis for this contention is Ex. B-1 dated 6-12-1961, a notice sent by the counsel for the original payee, namely, P. W. 1 to the first appellant herein demanding payment of the amount due under the promissory note. It is the correctness of this contention that we propose to consider in this appeal.

4. We may immediately mention that the appellants had not established that the respondent herein was aware of the payment of Rs. 3,000 made by the first appellant herein on 7-8-1961 or of the issue of the notice by the counsel for P. W. 1 to the first appellant on 6-12-1961 under Ex. B-1 at the time when he became an endorsee of the suit promissory note namely, on 10-9-1964. It is against this admitted fact that the question raised will have to be considered.

5. A promissory note may be payable either 'on demand' or " at a fixed or determinable future time." In the present case, promissory note, is payable on demand. According to Section 22 of the Act the maturity of a promissory note is the date at which it falls due. In view of this, a Bench of this Court in ***Nunna Gopalan* v. *Vuppuluri Lakshminarasamma*** [AIR 1940 Mad 631] has held that in the case of a promissory note which is payable on demand the note does not become payable until demand is made and on the demand being made it falls due immediately. Basing himself on this legal position and on Ex. B-1, the learned counsel for the appellants contended that Section 59 of the Act is attracted to the facts of this case and that consequently the respondent herein will have only such rights against the appellants herein as P. W. 1, the endorser, who had received a sum of Rs. 3,000 had against the appellants. We have extracted the relevant portion of Section 59 already. That section applies only to a holder and does not apply to a holder in due course. Section 118 of the Act deals with certain presumptions and one such presumption is that a holder of a negotiable instrument is a holder in due course [S. 118 (g)]. According to Section 9 of the Act, 'Holder in due course' means any person who for consideration became the possessor of a promissory note bill of exchange or cheque, if payable to bearer, or the payee or endorsee thereof, if payable to order, 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 his title. Admittedly in this case at the time when the respondent herein became an endorsee of the promissory note in question on paying the full amount due thereunder, he had no knowledge of either the notice. In view of this, the question for consideration is, whether the appellants had established, having regard to Sections 9 and 118 of the Act that the respondent herein was not a holder in due course. There is absolutely nothing in the evidence adduced on behalf of the appellants to establish this case namely, that the

respondent herein is not a holder in due course. From the mere fact that there is a notice, Ex. B-1, issued on behalf of the original payee to the first appellant herein demanding payment of the money due under the promissory note or that the first appellant herein paid a sum of Rs. 3,000 to P. W. 1 as evidenced by Ex. B-5, it cannot be concluded that the respondent herein is not a holder in due course, unless it is further established that the respondent had knowledge of either or both of the facts referred to above. With reference to a promissory note payable on demand, whether a demand for the payment of the same has been actually made or not will not be apparent on the face of the document and consequently the promissory note cannot be said to be overdue under Section 59 of the Act so as to affect the endorsee.

8. In view of the legal position, it must be held that the right of the respondent herein to sue on the promissory note and recover the full amount due thereunder cannot be said to have been affected by Section 59 of the Act.

9. However, the learned counsel for the appellants repeatedly contended before us that on 10-9-1964 when the respondent obtained the promissory note by endorsement it was long overdue since the promissory note was dated 6-4-1960. We are unable to accept this argument. It is no doubt true that the second of the endorsement of payment of interest has been made on 27-9-1961, as evidenced by Ex. A-1 (b) and the respondent himself obtained the promissory note by endorsement on 10-9-1964 namely, just 17 days before the suit thereon would have been barred by limitation. But we are unable to hold that this alone will make the respondent herein as a person, not a holder in due course. As pointed out by Thiruvenkatachariar, J. in the judgment referred to already-

> "If nothing more appears than that the instrument has been left outstanding for a pretty long period it cannot be concluded from that alone that the instrument had become payable when it was endorsed over to the holder as a promissory note payable on demand is according to custom and practice treated as a continuing security. For the same reason it cannot be held from that circumstance alone, that the endorsee had sufficient cause to suspect any defect in the title of the endorser."

We entirely agree with this observation of the learned Judge.

10. The case of the appellants cannot be looked at with reference to the payment of Rs. 3000 as evidenced by Ex. B-5 dated 7-8-1961. It is admitted that this payment is not endorsed on the promissory note itself. We have already referred to the contention of the appellants in the written statement that as was usual. P.W. 1 did not allow the first appellant to endorse the payment of Rs. 3000 made towards the principal amount due under the promissory note. However, that case has not been made out. On the other hand, the evidence will show that such a plea is not true. We have already referred to the case of the appellants that the interest due under the promissory note upto 27-9-1961 had been paid by the appellants to P.W. 1. As a matter of fact, the promissory note Ex. A-1, contains two endorsements of payment of interest – one dated 28-7-1961, marked as Exhibit A-1 (a) and the other dated 27-9-1961 marked as Ex. A-1 (b). It is significant to note that the payment of Rs. 3000 towards the principal has been made on 7-8-1961 namely, Ex. A-1 (a) endorsement and before Ex. A-1 (b) endorsement. Therefore when the first appellant made Ex. A-1 (b) endorsement on 27-9-

1961 there was nothing to prevent him from making the endorsement of payment of the principal amount of Rs. 3000 on 7-8-1961. Therefore, on the face of it, the case of the appellants that P. W. 1 did not allow them to endorse the payment of the principal of Rs. 3000 on 7-8-1961 is not true. Hence, when the respondent obtained the promissory note Ex. A-1, by the endorsement dated 10-9-1964 as evidenced by Ex. A-2, the promissory note apart from containing two endorsements of payment of interest did not contain any endorsement of payment of principal sum of Rs. 3000. In such a situation, the question is whether the respondent is prevented from suing on the promissory note for the entire amount due thereunder. Even at the risk of repetition, we may point out that it is not established that the respondent had knowledge of this payment of Rs. 3000. In such a situation, it was held in ***Annamalai Chetti* v. *Maung Saing*** [AIR 1927 Rang 161]:

> "Where the promissory note has no endorsement of any payment and there is nothing to show that the endorsee was aware of any payments to the endorser and he is a holder in due course, he is entitled to recover according to the apparent tenor of the instrument. If the instrument has been discharged, the remedy of the person paying is to sue the original payee to refund the amount which he had to pay over again."

This decision directly applies to the facts of this case. Consequently, if the appellant herein, by not making an endorsement of payment of Rs. 3000 on the promissory note enabled P. W. 1 to perpetrate a fraud by endorsing the note in favour of the respondent herein the appellants alone would have to bear the loss. In AIR 1940 Mad 631 to which we have already made reference the facts were the respondent therein executed a promissory note in favour of the second defendant in the suit on 10-12-1933, but paid the amount due on the promissory note two days later however, the instrument was left in the hands of the payee who on the next day endorsed it to the petitioner. The petitioner instituted a suit on the promissory note. The question was, whether the respondent could be made liable or not. This Court held that when the respondent paid the amount due under the promissory note she should have insisted on its return to her and when she did not do so and left the instrument in the hands of the payee and thus gave him an opportunity to commit a fraud she must suffer in preference to the petitioner. Similarly, in the present case, when the appellants paid a sum of Rs. 3000 to P.W. 1 on 7-8-1961 and did not make an endorsement thereof on the note itself and thereby enabled P.W. 1 to endorse the note to the respondent herein for full value, they alone must suffer the loss in preference to the respondent herein. After all it should not be forgotten that even when S. 59 of the Act applies to a particular case, it merely provides for the rights of an endorsee being subject to all equities. Under these circumstances, the appeal fails and is dismissed.

* * * * *

U. Ponnappa Moothan Sons v. *Catholic Syrian Bank Ltd.*

(1991) 1 SCC 113

K. JAYACHANDRA REDDY, J. - In this appeal an important question touching upon the interpretation of Section 9 of the Negotiable Instruments Act, 1881 defining 'holder in due course' falls for consideration.

2. The plaintiff Catholic Syrian Bank Ltd. is a banking company incorporated under the Indian Companies Act having its Head Office in Trichur and branches at various places. The first defendant firm consisting of defendants 2 to 4 as partners who are brothers, was doing business in Tellicherry in hill produces and they were allowed credit facilities by the plaintiff Bank, like accommodation by way of Hundi discount, key loan and cheque purchases up to a limit of Rs 35,00,000. A promissory note was executed by defendants 2 to 4 in favour of their mother, defendant 5 for an amount of Rs 35,00,000 and the same was endorsed in favour of the plaintiff as security for the facilities granted to the first defendant firm. Defendant 5 had also deposited the title deeds of her properties shown in the plaint schedule to create an equitable mortgage to secure the repayment of the amounts due from first defendant. The first defendant firm had dealings with defendant 6 as well as others. The first defendant firm was supplying goods consisting of hill products and used to receive payments by way of cheques. On October 26, 1974, defendant 6 drew a cheque on the Union Bank of India, Palghat Branch in favour of the first defendant payable to the first defendant firm or order a sum of Rs 2,00,000. The cheque was purchased by the plaintiff Bank from the first defendant on October 30, 1974 on valid consideration and proceeds were credited by the Bank to the account of the first defendant. Similarly another cheque was drawn on October 31, 1974 and the first defendant endorsed the same to the plaintiff for valid consideration and the proceeds were credited to the account of the first defendant who withdrew the amount at various dates. The plaintiff Bank sent the cheques for collection but the Union Bank of India returned the same with the endorsement "full cover not received". Defendants 2 to 5 by two separate agreements offered to pay the amounts to the plaintiff Bank and as per the terms therein they were to pay Rs 1000 per month and defendant 5 was to pay the amount realised by her from the tenants by way of rent and they could pay only Rs 12,313.35. Thereupon after exchange of notices between defendant 6 and other defendants a suit was filed for the recovery of the balance amount from defendant 6 who also issued the cheques.

3. Defendant 6 who is the appellant herein, contended that the cheques were issued to the first defendant on their representation that they would supply a large consignment of pepper, dry ginger etc. and the understanding was that the cheques would be presented only after the consignment was despatched. Since the first defendant failed to despatch the goods, defendant 6 could not pay the money in the Bank and therefore the cheques were not honoured. He also pleaded that he would not admit the purchase of cheques by the plaintiff and that plaintiff was only a collection agent and there was no consideration for purchase and therefore the plaintiff was not a holder in due course. It was also contended that plaintiff acted negligently and in disregard of the provisions of law, therefore there was no valid cause of action against the defendant. It may not be necessary for us to refer to the stand taken by the other defendants. The trial court held that the plaintiff is a 'holder in due course' and as

such is entitled to enforce the liability against defendant 6, who is the maker of the cheques. The trial court also held that defendants 2 to 4 were personally liable for the plaint claim and the assets of the first defendant would also be liable if the hypothecation is not sufficient to discharge the decree amount. Defendant 6 alone filed an appeal in the High Court and the others figured as respondents. The High Court confirmed the findings of the trial court but modified the decree holding that immovable properties described in the schedule to the plaint would be proceeded against in the first instance and if the entire decree amount cannot be realised by the sale of those properties, the plaintiff-Bank would proceed against the assets of the first defendant-firm, and for the balance, if any, the decree-holder would proceed against defendants 2 to 4 and 6 and the liability of defendant 5 is restricted to the extent of immovable properties mortgaged by her. Aggrieved by the said judgment and decree, defendant 6 has preferred this appeal.

4**.** Dr Chitale, learned counsel appearing for the appellant submitted that respondent 1 herein namely the plaintiff Bank is not a 'holder in due course' and therefore cannot maintain any legal action against the appellant i.e. defendant 6 who had drawn the cheques. His main submission is that the plaintiff Bank acted negligently and did not act in good faith in paying the amounts due under the cheques to the defendant firm without making any enquiries regarding the "title" of the person namely defendant 1 from whom the Bank claims to have purchased the cheques for consideration. It is submitted that the cheques were issued by defendant 6, the appellant, with the understanding that the goods would be supplied and the plaintiff Bank without making any enquiries whether the goods were supplied or not and without any verification from the Union Bank of India paid the amounts to the payee namely defendant 1 within few days in a hasty and negligent manner. Therefore, according to the learned counsel, the necessary ingredients of the definition of 'holder in due course' in the case of plaintiff are not satisfied and consequently the plaintiff Bank cannot maintain any claim against the appellant.

5**.** Section 9 of the Act which defines 'holder in due course'. The definition makes it clear that to be a 'holder in due course' a person must be a holder for consideration and the instrument must have been transferred to him before it becomes overdue and he must be a transferee in good faith and another important condition is that the transferee namely the person who for consideration became the possessor of the cheque should not have any reason to believe that there was any defect in the title of the transferor.

6**.** It is beyond dispute that the plaintiff Bank credited the proceeds to the account of the first defendant who also withdrew the amount on various dates. Therefore it has been rightly held that the plaintiff purchased the cheques for valid consideration after the necessary endorsement by the bearer before they became overdue. In this context, the learned counsel, however, contended that the plaintiff was only a holder and was only a collection agent as per the endorsement made by the first defendant. Section 8 defines 'holder' as a person entitled in his own name to the possession of a cheque or bill of exchange or a promissory note and to receive or recover the amount due thereon from the parties thereto. In the instant case, the holder namely the first defendant made the necessary endorsements in the two cheques in favour of the plaintiff Bank and the Bank endorsed "payee account credited". The first defendant withdrew this amount and there is no dispute about it. It must also be noted in this

context that there is no endorsement on the cheque made by the drawer namely the appellant that the cheques are not negotiable. In the absence of the cheques being crossed as "not negotiable" nothing prevented the plaintiff Bank to purchase the cheques for a valuable consideration and the presumption under Section 118(*g*) comes to his rescue and there is no material whatsoever to show that the cheques were obtained in any unlawful manner or for any unlawful consideration.

7**.** Now the question is whether the other requirement of the definition i.e. "without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title" is satisfied. It is contended on behalf of the appellant that the cheques were issued on the representation that defendant 1 would supply the goods and that the cheques would be presented after the despatch and delivery of the goods but defendant 1 failed to despatch the goods and that plaintiff without any enquiries about the title of the payee could not have purchased the cheques because there was sufficient cause to believe that the title of the bearer was not free from defects. According to the learned counsel, the Indian law is stricter, and is not satisfied merely with the honesty of the person taking the instrument, but requires the person to exercise due diligence, and goes a step further than English law in scrutinising the causes which go to make up the belief in the mind of the transferee.

8**.** To appreciate the submission of the learned counsel it becomes necessary to refer to the various authorities cited by him including the textbooks, in the first instance on English law and then an Indian law on the subject. In English law, Section 29 of the Bills of Exchange Act, 1882 defines 'holder in due course'. The relevant part of Section 29(1)(*b*) reads thus:

> "***29. Holder in due course***. - (*a*) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:
>
> (*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

Section 90 of this Act reads as under:

> ***"90. Good faith***. - A thing is deemed to be done in good faith within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not."

These provisions have been understood and interpreted to mean that the holder should take the bill in good faith and he is deemed to have acted in good faith and if he acts honestly and negligence will not affect his title.

10**.** In **Chitty on *Contracts*** (26th edn.) the learned author states the requirement that must be fulfilled before a person may be considered a holder in due course as under:

> "First, he must take the bill when it is complete and regular on its face. Secondly, he must take it before it is overdue and without notice that it was previously dishonoured, if such was the fact. Knowledge that a bill is bound to be dishonoured may also be relevant. Thus, a Canadian authority suggests that a holder, who has

taken a cheque with the knowledge of its having been countermanded, is not a holder in due course. Thirdly, he must take it in good faith and without having notice of any defect in the title of the person who negotiates the bill to him. In particular the title of the person who negotiates the bill is defective when he obtained the bill or its acceptance by fraud, duress or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under circumstances amounting to fraud. Last, a holder in due course must take the bill for value i.e. consideration."

The learned author dealing with the presumption of good faith has noted in paragraph 2781 thus:

> ***"Presumption of good faith***.- Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value. Every holder of a bill is prima facie deemed to be a holder in due course; but if the acceptance, issue or subsequent negotiation of the bill was affected with fraud, duress or illegality, the burden of proof is shifted, and the holder must prove that, subsequent to the alleged fraud or illegality, value was in good faith given for the bill. Thus, once a fraud is proved, the burden of proof is shifted to the holder who must then show not only that value has been given for the bill, but also that he took the bill in good faith and without notice of the fraud. If the holder can discharge this onus he is, again, in the position of a holder in due course."

The learned author Chitty in paragraph 2778 dealing with the subject 'The Consideration for a Bill' has stated thus:

> "For example, if a person whose banking account is overdrawn negotiates to his bankers a cheque, drawn by a third party, to reduce the overdraft, the banker becomes a holder for value of the cheque. The pre-existing debt of the overdraft, is a sufficient consideration for the negotiation of the cheque to the banker."

11**.** A consideration of the above passages and decisions goes to show that English law requires that the holder in taking the instrument should act in good faith and that he had no notice of any defect in the title and if he has acted honestly, he is deemed to have acted in good faith whether it is negligently or not. With the above background of English law, we shall now examine the Indian law on the subject.

12**.** In Bhashyam and Adiga on ***The Negotiable Instruments Act*** (15th edn., p. 171), the authors have dealt with the position in Indian law and it is observed that it would be seen that the Indian legislature has adopted the older English law as laid down by Abbott, C.J., (later Lord Tenterden) in ***Gill* v. *Cubitt*** [107 ER 806] Relying on this passage the learned counsel proceeded to submit that the Indian law is stricter than English law and requires the person to exercise due diligence and in this context the Indian law goes even a step further than English law in scrutinising the causes which go to make up the belief in the mind of the transferee. *Gill case* is a case where a bill of exchange was stolen during the night, and taken to the office of a discount broker early in the following morning by a person whose features were known, but whose name was unknown to the broker and the latter being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any enquiry of the person who brought it. On these facts it was held that the plaintiff had taken

the bill under circumstances which ought to have excited the suspicion of a prudent and careful man. Abbott, C.J. observed:

> "It appears to me to be for the interest of commerce, that no person should take a security of this kind from another without using reasonable caution. If he takes such security from a person whom he knows, and whom he can find out, no complaint can be made of him. In that case he has done all any person could do. But if it is to be laid down as the law of the land, that a person may take a security of this kind from a man of whom he knows nothing, and of whom he makes no enquiry at all, it appears to me that such a decision would be more injurious to commerce than convenient for it, by reason of the encouragement it would afford to the purloining, stealing, and defrauding persons of securities of this sort. The interest of commerce requires that bona fide and real holders of bills, known to be such by those with whom they are dealing, should have no difficulties thrown in their way in parting with them. But it is not for the interest of commerce that any individual should be enabled to dispose of bills or notes without being subject to enquiry."

Bayley, J. agreeing with Abbott, C.J., however, added:

> "I admit that has been generally the case; but I consider it was parcel of the bona fides whether the plaintiff had asked all those questions which, in the ordinary and proper manner in which trade is conducted, a party ought to ask. I think from the manner in which my Lord Chief Justice presented this case to the consideration of the jury, he put it as being part and parcel of the bona fides; and it has been so put in former cases."

Holroyd, J., having agreed with Abbott, C.J. further observed that:

> "The question whether a bill or note has been taken bona fide involves in it the question whether it has been taken with due caution. *It is a question of fact for the jury*, under all the circumstances of the case, whether a bill has been taken bona fide or not; and whether due and reasonable caution has been used by the person taking it. And if a bill be drawn upon parties of respectability capable of answering it, and another person discounts it merely because the acceptance is good, without using due caution, and without inquiring how the holder came by it, I think that the law will not, under such circumstances, assist the parties so taking the bill, in recovering the money. If the bill be taken without using due means to ascertain that it has been honestly come by, the party, so taking on himself the risk for gain, must take the consequence if it should turn out that it was not honestly acquired by the person of whom he received it. Here the person in possession of the bill was a perfect stranger to the plaintiff, and he discounted it, and made no inquiry of whom the bill had been obtained, or to whom he was to apply if the bill should not be taken up by the acceptor. I think those circumstances tend strongly to show that the party who discounted the bill did not choose to make inquiry, but supposing the questions might not be satisfactorily answered, rather than refuse to take the bill, took the risk in order to get the profit arising from commission and interest." (*emphasis supplied*)

In **Chalmers on *Bills of Exchange*** (13th edn., page 283) the learned author deals with the expression 'good faith' occurring in Section 90 of the said Act and it is stated as under:

> **"*Test of bona fides*.**- The test of bona fides as regards bill transactions has varied greatly. Previous to 1820 the law was much as it now is under the Act. But under the influence of Lord Tenterden (Abbott, C.J. in *Gill* v. *Cubbitt*) due care and caution was made the test, and *this principle seems to be adopted by Section 9 of the Indian Negotiable Instruments Act*. "

The learned author Parathasarathy in his book ***Cheques in Law and Practice*** (4th edn.) has also noted this aspect. At page 74, a passage reads thus:

> "The Indian definition imposes a more stringent condition on the holder in due course than does the English definition. Under English law, he should not have notice of a defect in the transferor's title and he should have taken the instrument in good faith. Under Indian law, there should be no cause to believe that any such defect existed. Hence, it is not sufficient if the holder acts in good faith. He should also exercise due care and caution in taking the instrument. Perhaps, the Indian definition is based on ***Gill* v. *Cubbit***."

In ***Raghavji Vizpal* v. *Narandas Parmanandas*** [(1906) 8 Bom LR 921] the Bombay High Court, however, held that negligence does not affect the title of a person taking the instrument in good faith for value. It is observed thus:

> "The test of good faith in such cases is thus: Regard to the *facts* of which the taker of such instruments had notice is most material whether he took in good faith. If there be anything which excites suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the *facts* presented to him *and puts the suspicions aside without further inquiry*."

We may also mention it here that there is no reference to ***Gill*** case in the above decision. In Bhashyam and Adiga on ***The Negotiable Instruments Act*** (15th edn., p. 172), the author having noticed the ratio in ***Raghavji*** case observed:

> "The Bombay High Court quoted the later English decisions with approval and applied them to the facts of the case before them, but the question is not discussed in the light of the words of this section, and the decision is opposed to the opinion expressed by Chalmers in his commentaries on the Indian Act."

In ***Durga Shah Mohan Lal Bankers* v. *Governor General in Council*** [AIR 1952 All. 590], a Division Bench examined the scope of the provisions of Section 9 of the Act and held that:

> "The provision that the person must have become possessor of a cheque "without having sufficient cause to believe" is more favourable to the person who claims to have become holder in due course than the words "acting bona fide". His claim would be defeated only if it is found that there was sufficient cause for him to believe that a defect existed. If he fails to *prove bona fides or absence of negligence*, it would not negative his claim. There must be evidence of positive circumstances on account of which he ought to have believed that some defect existed."

In this case also there is no reference to ***Gill*** case. The learned counsel for the appellant submitted that the decision in ***Raghavji*** case is in favour of the appellant. He, however, conceded that the ***Durga Shah*** case is in favour of the respondent i.e. the plaintiff Bank. We may, however, note another judgment of the learned Single Judge of the Bombay High Court in ***Sunderdas Sobhraj, a firm*** **v.** ***Liberty Pictures, a firm*** [AIR 1956 Bom 618] wherein the scope of Section 9 is considered and it is held thus:

> "The rule as laid down in Section 9 of the Negotiable Instruments Act which defines "holder in due course" is stricter than the rule of English law on the subject and a payee or endorsee of a negotiable instrument can, under our law, prefer a claim to be a holder in due course of the instrument only if he obtained the same without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.
>
> A bona fide holder for value without notice is, of course, as I have already observed, in a different position."

The learned Single Judge has not, however, referred to the ***Raghavji*** case. We have already noted that in ***Raghavji*** case reliance was placed on English decisions later to the decision in *Gill case*. The authors Chalmers, Bhashyam and Adiga and Parathasarathy have uniformly stated that Section 9 of the Act is based on the ratio in ***Gill*** case. Learned counsel appearing on both sides could not place any other decision directly on the question. The view taken by the Allahabad High Court in ***Durga Shah*** case is more or less in accordance with the principle laid down in ***Gill*** case.

13**.** However, with regard to the legal importance of negligence in appreciating the principle of "sufficient cause to believe" a passage from Chalmers' book ***The Law Relating to Negotiable Instruments in British India*** (4th edn.) may usefully be noted:

> "All the circumstances of the transactions whereby the holder became possessed of the instrument have a bearing on the question whether he had "sufficient cause to believe" that any defect existed.
>
> It is left to the court to decide, in any case where the holder has been negligent in taking the instrument without close enquiry as to the title of his transferor, whether such *negligence is so extraordinary as to lead to the presumption that the holder had cause to believe that such title was defective*."

This view is more sound and logical. The legal position as explained by Chitty may be noted in this context which reads as under:

> "While the doctrine of constructive notice does not apply in the law of negotiable instruments the holder is not entitled to disregard a "red flag" which has raised his suspicions."

We, therefore, modify the view taken by the Allahabad High Court in ***Durga Shah*** case to the extent that though the failure to prove bona fide or absence of negligence would not negative the claim of the holder to be a holder in due course, yet in the circumstances of a given case, if there is patent gross negligence on his part which by itself indicates lack of due diligence, it can negative his claim, for he cannot negligently disregard a "red flag" which arouses suspicion regarding the title. In this view of the matter we hold that the decision in

Raghavji case does not lay down correct law. We agree with the view taken by the Allahabad High Court with above modification.

14**.** Before we apply the above principles to the facts of this case we would like to advert to another submission of the learned counsel Dr Chitale. He urged that in the instant case the plaintiff Bank has not acted in good faith and with due diligence in crediting the proceeds to the account of the first defendant inasmuch as there is no authority either by way of express or implied contract between them and the first defendant. In support of this submission he relied on certain passages in **Halsbury's *Laws of England*.** In **Halsbury's *Laws of England*** (4th edn. in paragraph 221, page 186), the author says:

> ***"Bank as holder for value***.- A banker who is asked by a customer to collect a cheque and who, pursuant to a contract express or implied to do so, credits the customer forthwith with the amount of the cheque before the proceeds are received, in fact receives the sum for himself and not for the customer; but he has the same statutory protection in such circumstances as if he had received payment of the cheque for the customer.
>
> Every holder is deemed to be a holder in due course; but, if the instrument is shown to be affected by fraud, a banker dealing with it must show that he gave value in good faith subsequent to the fraud. The status of holder for value may be claimed by the bank; where cash has been given for the cheque over the counter; where the cheque is paid in reduction of an overdraft, where the cheque is paid in on the footing that it may be at once drawn against, whether in fact it is drawn against or not; or where the cheque is subject to a lien. However, the mere existence of an overdraft, though the banker's lien in respect thereof makes him a holder for value to the extent of that lien, would not preclude the protection.
>
> A banker who gives value for, or has a lien on, a cheque payable to order which the holder derives to him for collection without indorsing it has such, if any, rights as he would have had if, upon delivery, the holder has indorsed the cheque in blank. A banker taking such a cheque is the holder thereof and, if the requisite conditions are present, a holder for value or in due course. It is not essential that the cheque be credited to the account of the holder."

15**.** In ***A.L. Underwood Ltd.* v. *Bank of Liverpool*** [(1924) All ER Rep 230], Atkin, L.J. dealing with the protection that can be availed by a banker in such case, observed as under:

> "It is sufficient to say that the mere fact that the bank, in their books, enter the value of the cheques on the credit side of the account on the day on which they receive the cheques for collection, does not, without more, constitute the bank a holder for value. To constitute value there must be in such a case a contract between banker and customer, express or implied, that the bank will, before receipt of the proceeds, honour cheques of the customer drawn against the cheques. *Such a contract can be established by course of business and may be established by entry in the customer's passbook,* communicated to the customer and acted upon by him. Here there is no evidence of any such contract." To the same effect is the ratio laid down in ***Baker* v. *Barclays Bank Ltd*** (1955) 2 All ER 571 After applying the dictum of Atkin, L.J. in ***Underwood*** case, it is observed therein that "it was not enough to

> show merely that the bank had entered the value of the cheques on the credit side of the account on which the bank received the cheques. To constitute value there must be in such a case a contract between banker and customer, express or implied, that the bank will before receipt of the proceeds honour cheques of the customer drawn against the cheques."

17. From the above discussion it emerges that the Indian definition imposes a more stringent condition on the holder in due course than the English definition and as the learned authors have noted the definition is based on *Gill case*. Under the Indian law, a holder, to be a holder in due course, must not only have acquired the *bill, note or cheque for valid consideration but should* have acquired the cheque without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. This condition requires that he should act in good faith and with reasonable caution. However, mere failure to prove bona fide or absence of negligence on his part would not negative his claim. But in a given case it is left to the court to decide whether the negligence on part of the holder is so gross and extraordinary as to presume that he had sufficient cause to believe that such title was defective. However, when the presumption in his favour as provided under Section 118(*g*) gets rebutted under the circumstances mentioned therein then the burden of proving that he is a 'holder in due course' lies upon him. In a given case, the court, while examining these requirements including valid consideration must also go into the question whether there was a contract express or implied for crediting the proceeds to the account of the bearer before receiving the same. The enquiry regarding the satisfaction of this requirement invariably depends upon the facts and circumstances in each case. The words "without having sufficient cause to believe" have to be understood in this background.

18. In the instant case there is sufficient evidence establishing the fact that the defendants were allowed credit facilities up to a limit of Rs 35,00,000 by the Bank and this fact is not in dispute. The pledging of the title deed by defendant 5 of her properties with the Bank with an intention to create an equitable mortgage to secure the repayment of the amounts due from the first defendant and the fact that a pronote for an amount of Rs 35,00,000 executed by defendants 2 to 4 in favour of defendant 5 was endorsed in favour of the plaintiff Bank would establish that there was an express contract for providing the credit facilities. It should therefore necessarily be inferred that there is also an implied contract to credit the proceeds of the cheques in favour of the first defendant to his account before actually receiving them. As a question of fact this aspect is established by the evidence on record. In such a situation the plaintiff need not make enquiries about the transactions of supply of goods etc. that were going on between defendants 1 and 6. Even if defendant 1 has not supplied the goods in respect of which the cheque in question were issued by defendant 6 there was no cause at any rate sufficient cause for the plaintiff to doubt the title of the first defendant nor can it be said that the plaintiff acted negligently disregarding 'red flag' raising suspicion. Viewed from this background it cannot be said that there was sufficient cause to doubt the title nor there is scope to infer gross negligence on the part of the plaintiff.

19. There is no material which amounts to rebuttal of the presumption in his favour as provided under Section 118(*g*). On the other hand, the plaintiff has discharged the necessary burden to the extent on him and has proved that he is a holder in due course for valid

consideration. Therefore, we hold that he could validly maintain an action against all the defendants including defendant 6. Therefore, we affirm the judgments of the courts below and dismiss the appeal.

* * * * *

Canara Bank Ltd. **v.** *I. V. Rajagopal*

(1975) 1 MLJ 420

RAMAPRASADA RAO, J. - The plaintiff had a personal account with the Canara Bank Limited, at its Madras Branch hereinafter referred to as the Bank on 6th April, 1964. The plaintiff was the representative of a reputed group of concerns in Coimbatore, popularly known as M/s. Lakshmi Mills Company Limited, Coimbatore, and its sister concerns at Madras. The group companies had a liaison office at Madras. There was a telephone in the Madras office of the group companies, which was apparently intended for the advantage and benefit of the sister concerns and which was in the sole administrative custody of the plaintiff. In the course of his official duties, the plaintiff gave a cheque for Rs. 294-40 towards the telephone bill for the aforesaid telephone admittedly standing in the name of the said M/s. Lakshmi Mills Company Limited. This cheque was drawn on the personal account kept by the plaintiff with the defendant-bank. On 8th April, 1964 when the cheque came for clearance, the defendant did not honour the cheque, though the plaintiff had a sum of Rs. 653-83 to his credit in his account with the banks. On 24th April, 1964, the telephone department advised the plaintiff of the dishonour of the cheque. The plaintiff met the officials of the Bank on 28th April, 1964 and according to the defendant, the manager of the Madras Office of the Bank expressed regret for what all happened. It is said that the manager of the department approached the telephone department and requested them to re-present the cheque for payment. Apparently, the telephone department was not interested in such representation. But on prompt steps taken by the plaintiff it was resorted on 7th May 1964. As the telephone bill remained unpaid, the telephone was disconnected on 6th May, 1964. The plaintiff tried to explain to his employers the circumstances under which the cheque was dishonoured and how the telephone was disconnected and later restored. The plaintiff's employers, however, did not, accept the explanation and on 15th June, 1964 the plaintiff's services were terminated. According to the plaintiff, he lost the job, which was fetching him a sum of Rs. 600 per mensem besides free boarding and lodging and a car for his conveyance, on the sole ground that the plaintiff did not pay the telephone bill in time as a result of which the telephone was disconnected. The plaintiff says that the defendant was mainly responsible for not having honoured the cheque, when there was sufficient money to his credit and such negligence on the part of the defendant bank which was wilful resulted in himself being dismissed from the reputed group concerns of M/s. Lakshmi Mills Company Limited, Coimbatore. He would allege that but for this happening, he would have continued in the mill for a period, of 10 years with better prospects and advantages and might have earned about Rs. 75,000 which had been lost once and for all. The plaintiff however, limited his claim for compensation or damages against the defendant-bank for loss of earnings for a period of five years, which he estimated at Rs. 36,000 and also claimed a sum of Rs. 14,000 for loss of prestige and status and for mental agony caused to him by losing his covetable job. As the plaintiff's notice of demand was not respected, he filed the present action *in forma pauperis* for recovery of Rs. 50,000 being the damages suffered by him because of the wrongful dishonour of the cheque by the Bank.

2. In the written statement the defendant admits that the plaintiff had a current account with its branch office at Thambu Chetty Street, Madras, and that the plaintiff was working as the representative of Messrs. Lakshmi Mills Company Limited. They would concede that by mistake and oversight the cheque for Rs. 294-40 presented by the Telephone Department was dishonoured and that they expressed regret in person for the same and that they assured the plaintiff that they would inform the Telephone Department at Madras about the mistake and arrange for payment on representation of the said cheque. They followed up the interview with the plaintiff, by phoning up the cash Department of the Madras Telephones and requested them that the cheque may be represented once again. They were informed that the Telephone Department would do so and hence they did not take any further steps. They also expected the plaintiff to forward another cheque to the Telephone Department with a request for the representation of the same. They would allege that they have taken all possible and reasonable steps to arrange for payment of the cheque on representation. According to the defendant, if the facts relating to the dishonour of the cheque was conveyed to the Managing Agents of M/s. Lakshmi Mills Company Limited, Coimbatore, and if, after all this, the Mills terminated the service without reference to the Bank, it was an arbitrary act on the part of the employers and would allege that the said termination of service and the damages claimed and said to have been suffered by the plaintiff cannot, in law and in fact, be said to flow naturally from the dishonouring of the cheque. They would deny that the plaintiff was entitled to the damages as claimed by him and would refer to certain incidents in 1963 and 1964 which would reflect upon the status of the plaintiff. In any event, they would say that the plaintiff did not take immediate steps to avert the consequence, which would flow from the dishonour of the cheque and mitigate the damages. The claim for Rs. 50,000 is excessive and unreasonable. The defendant would specifically plead that the plaintiff ought to have issued a fresh cheque on his account or utilised the other funds of his employer for paying the telephone bill and he, not having taken such steps, cannot claim the exaggerated amount of Rs. 50,000. The plaintiff filed replication and answered that the reference made by the Bank to his dealings in 1963-64 were irrelevant besides being incorrect. He would add that when the cheque issued towards the telephone bill of a reputed company was not honoured, it did react on the reputation of the company and it is only on account of the dishonour and the supervening disconnection of the telephone, that his services were terminated. The correspondence that ensued between the plaintiff and his employers will disclose how the principals were greatly upset by the dishonour of the cheque and the later disconnection of the telephone and would assert that the immediate and proximate cause for his termination of service is the wilful and negligent act of the dishonour of the cheque by the defendant-bank.

3. A supplemental written statement was also filed wherein again the defendant would reiterate their stand. On the above pleadings, the following issues were framed:

1. What is the total compensation or salary which the plaintiff was entitled to as employee by the Lakshmi Mills Limited, and sister concerns as alleged by him?
2. Whether the defendant is not liable to compensate the plaintiff for the damage or loss caused to him by the default in honouring the plaintiff's cheque?
3. Was the dishonouring of the palintiff's cheque wilful and negligent?

4. Was the damage claimed by the plaintiff, the natural and reasonable consequence of dishonouring the cheque by the defendant bank?

5. Was the service of the plaintiff terminated by the Lakshmi Mills Limited, and sister concerns as a result of the dishonouring of the cheque?

6. To what damages, if any, general and special is the plaintiff entitled to? and

7. To what relief?

4. On issues 2 and 3, the trial Court found against the defendant. It held that the dishonouring of a cheque by a Bank if it is due to mistake cannot affect the liability of the Bank to pay damages, which would reasonably flow from their wrongful act. It also observed that the conduct of the Bank throughout reflects that they were negligent in handling the transaction and hence, would find that the dishonoring of the cheque issued by the plaintiff, in the circumstances, should be viewed to be due to indifference and wilful negligence. On issues 4 and 5, the trial Judge found that the action of Lakshmi Mills Company Limited, against the plaintiff was because of the disconnection of the telephone and such disconnection was because of the dishonour of the plaintiff's cheque Exhibit A-1 by the defendant Bank. On issues 1 and 6, the trial Court estimated the damages in all at Rs. 14,000 and decreed the suit accordingly and directed the defendant to pay Court-fee on the amount allowed and directed the plaintiff to pay the Court-fee on the sum disallowed. It is as against this, the present appeal has been filed.

5. The learned Counsel for the appellant would say that the termination of the plaintiff's services by M/s. Lakshmi Mills Company Limited, cannot solely be attributed to the dishonouring of the cheque and the later disconnection of the telephone but according to him it is due to other causes. In any event, he would say that the special damages of Rs. 10,000 granted by the Court-below and general damages of Rs. 4,000 under the head of mental agony and loss of reputation are on the high side and exaggerated. On the other hand, Mr. Challapathy Rao, learned Counsel for the respondent-plaintiff would urge that the damages were correctly reckoned by the Court below and that such damages flow from the wilful and negligent act of the officers of the appellant Bank and that the defendant is liable to suffer the decree.

6. Before we consider the respective broad contentions, it is necessary to summarise the relevant correspondence, which led to the catastrophe in this case. It is common ground that Exhibit A-1, which is the cheque drawn by the plaintiff was issued by the plaintiff at a time when he had enough money in the Bank in his account for the same being honoured. The Bank having so indifferently dealt with its customer's account, did not even make a second verification regarding their act, but kept silent over it until the plaintiff called upon them and apprised of the position. In fact, the plaintiff was advised about the dishonour of the cheque by the Telephone Department on or about 24th April, 1964 and he met the officers of the Bank on the same day besides writing them a letter. Even then, the Bank would take the incidents very lightly and under Exhibit A-4 they would write a formal and a casual letter to the District Manager, Telephones, Madras, stating that they had telephonic conversation with their cash department in respect of the cheque and requested the Madras Telephones to represent the cheque for payment. This is the least that could be expected of a Banker, who has realised his mistake in dishonouring the cheque. One should have expected the Bank to

have taken more concrete steps in averting further untoward consequences in the matter of the dishonoured cheque when, as Bankers they ought not to have done it. Besides writing Exhibit A-4, no further steps were taken by the Bank. It is no doubt true that one of the assistants of the Bank expressed personally regret. But between 24th April, 1964 and 6th May, 1964 when the cheque was dishonoured, the silence and the inaction of the Bank remains unexplained. When, therefore the telephone was disconnected, the plaintiff wrote Exhibit B-1, dated 6th May, 1964 wherein the plaintiff intimated to the Bank that the Telephone Department has taken further steps to disconnect the telephone. No doubt, the plaintiff took emergent steps to restore the phone on the 7th of May, 1964, which step was taken on his own and not for and on behalf of the Bank either. When the Bank was informed about the phone disconnection and about the mental agony, which by then the plaintiff was suffering since he was being taken to task by his employers for such gross dereliction of duty, the defendant-Bank would still in a light-hearted manner reply to Exhibit B-1 under Exhibit A-7 stating that they took up the matter with the Telephone Department and that the Department agreed to represent the cheque and concluded "in spite of this, we do not understand why this misunderstanding has been created". Here again, there is no contrite expression of regret on the part of the Bank excepting to formally express it to the plaintiff.

7. Thereafter the concerned exhibits revolve round the correspondence which passed between the plaintiff and his employers, which resulted in his service being terminated. The plaintiff apprised his employers under Exhibit A-5, dated 7th May, 1964 in writing as to the circumstances under which the telephone was disconnected. It appears to be fairly clear that the employers by then were very much dissatisfied about the way in which the matter was handled by the plaintiff and his Bankers and Exhibit A-5 was in the nature of a letter of apology written by the plaintiff to his employers and was one in which he requested them to pardon him for the unhappy incident. Under Exhibit A-8 he was asked to go over to meet the managing agents at Coimbatore. The plaintiff could not meet the managing agents at Coimbatore and wanted time till 22nd May, 1964, as he was ill by then. This is seen from Exhibit A-9. Again he was asked by a telephonic message as is seen from Exhibit A-6 to render accounts for the matters, which he was dealing with by them and also go over to Coimbatore to meet Mr. G. K. Devarajulu Naidu, who was the Managing Director of the Mills. In reply thereto, the plaintiff gave a statement of account in respect of the moneys of the group companies which he maintained as their representative of the Madras branch. This statement of account was not fully accepted by their employers as is seen from Exhibit A-27. The employers had to pursue the matter under Exhibit A-12 and call for further accounts. It is no one's case that the employers were so tight and corrective as against the plaintiff prior to the dishonouring of the cheque and disconnection of the telephone. Exhibit A-13 and A-14 are further letters, which were exchanged between the plaintiff and his employers. In the meantime the plaintiff wanted to make a frantic but a last effort with the Bankers so that he could avert a catastrophe so far as his connections with Messrs. Lakshmi Mills Company Limited, was concerned, and wrote exhibit A-15 to the Bank. In Exhibit A-15 the plaintiff requested the Bank to write to him that there was enough money in the account in the Bank on the date when the cheque was dishonoured and that it was by oversight on the part of the Bank that the amount under the cheque was not paid and that it was because of it, the telephone was disconnected. He would also make it clear that such a letter giving the facts

could convince his employers. He made it candid that if the Bank kept silent in spite of his requests, his services would be terminated for which the Bank would be held responsible. To this there was no reply and ultimately the expected event happened and under Exhibit A-16 the plaintiff's services were terminated. The plaintiff thereafter followed up the events by issuing Exhibit B-2, the Counsel's notice before suit claiming a sum of Rs. 50,000 as damages and has come to Court thereafter.

8. The plaintiff examined himself besides letting in other evidence, oral and documentary. The defendant examined the Manager of its branch office when the incident happened. The plaintiff reiterated what all he said earlier in the correspondence. He referred to the fact that he was the liaison officer of four companies, which were very reputed establishments; they were Lakshmi Mills Company Limited; Lakshmi Machine Works Limited; Lakshmi Card clothing Manufacturing Company Private Limited, and G. Kuppuswamy Naidu and Company. His business was to attend as a liaison officer to the purchase and despatch of goods required by the concerns, to take the delivery of imported machinery from Harbour and despatching them to Coimbatore and selling motors and pumps manufactured by them. In that context he brought out before the Court that the telephone was the essential link between himself and his employers. He reiterated what all he had stated in the correspondence, but accepted that he got a part-time job under Sri Rama Vilas Mills Limited, Coimbatore at Rs. 285 per month and that job was from 1st September, 1964 to 31st December, 1966 and from 1st January, 1967 he was without any employment. In cross-examination it was brought out that the telephone connection was in the name of Lakshmi Mills Company Limited, and that the four other concerns, which were appointed with it, were sharing the expenses towards that phone. The Bank would refer to some personal discussions it had with one Rudrappa Naidu, who was undoubtedly connected with Lakshmi Mills etc. Ultimately, what is brought about in the cross-examination has merely a bearing on the letters and the correspondence which ensued between the plaintiff and the bank.

9. Mr. Nayak, appearing for the Bank was unable to dislodge the finding of fact by the Court below that the disconnection of the telephone was due to the dishonour of the cheque and that the dishonour of the cheque was due to the negligence of the Bank. The Counsel's attempt was to sustain the attitude of the bank and urge that they have taken all steps to avoid an injury to the plaintiff. His further contention was that all necessary steps were taken by the bank so as to make out absence of negligence on their part. We are unable to agree with the learned Counsel for the appellant that the bank was *bona fide* in its attempts to avert negligence on its part. We have already traced briefly the correspondence which touch upon the presence or absence of negligence on the part of the bank. When the bank was apprised of the dishonour, one would expect the officials of the bank, instead of being light-hearted and chimercial in their attitude, should promptly act so as to satisfy their customer whose cheque they negligently dishonoured. Exhibit A-4 which the bank wrote does not appear to be a *bona fide* step taken by them in the situation. When the cheque was dishonoured, they ought to have issued a credit note or paid off cash to the Telephone Department and advised them to treat the return of the cheque as to of no consequence. But, on the other hand, a casual letter was written asking the District Manager, Telephones to represent the cheque. Mere expression of regret is not the answer to the situation. It is expected of a bank to honour its

customer's cheque if it has sufficient funds in his hands. If it fails to do so, it will be liable to damages. The reason is obvious. It injuriously affects the reputation, credit and integrity of its customer. Even section 31 of the Negotiable Instruments Act provides that the drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and in default of such payment, must compensate the drawer for any loss or damage caused by such default. The bank aggravated the situation by its inaction between 24th April, 1964 and 6th May, 1964. Even when the bank was put on notice about the disconnection of the telephone, the attitude of the bank did not change. The plaintiff in an agonising mood complained under Exhibit B-1 about the gravity of the situation. The bank would reply in a very matter of fact fashion stating that it took up the matter with the Telephone Department and has concluded by saying "in spite of this we do not understand why this misunderstanding has been created". Of course, they followed it up by an expression of regret. As pointed out by a Division Bench of this Court in ***New Central Hall* v. *United Commercial Bank*** [AIR 1959 Mad. 153], the fact that such dishonouring took place due to a mistake of the Bank is no excuse nor can the offer of the Bank to write and apologise to the payees of such dishonoured cheques affect the liability of the bank to pay damages for their wrongful act". The bank would plead that they had a frank discussion with Sri Rudrappan who was one of the principal representatives of the employers. Nothing prevented the Bank from taking out a sub-poena to Sri Rudrappan to prove their effort at reconciliation. Here again the bank miserably failed to take any such steps.

10. On the other hand it is clear in the instant case that the dismissal of the plaintiff from the service of his employer was due to the disconnection of the telephone of the group companies which action had a definite impact on the dishonour of the cheque. It has not been brought out that the employers ever had any serious complaint against the plaintiff prior to the dishonour of the cheque. As a matter of fact, the letters exchanged between the plaintiff and his employers as summarised above by us is a pointer to the effect that it was the dishonour of the cheque and the consequential serious inconvenience caused to the employer in the matter of disconnection of the telephone, which appears to be a commercial necessity for the well-known group companies at all times, that was mainly responsible for the ultimate dismissal of the plaintiff from service. A last minute effort was made by the plaintiff asking the bank to write to him about the real state of affairs. In Exhibit A-15 he made such a specific request and made it clear that such a letter is likely to convince his employers and such a conviction if gained is likely to avoid the catastrophe of his dismissal from service. The bank never cared to reply. We are satisfied that beyond reasonable doubt, there is sufficient nexus between the dishonour of the cheque and the consequential disconnection of the telephone with the final act of dismissal of the plaintiff from service by his employers. It is not in dispute in the instant case that the group companies in which the plaintiff was employed was a commercial group having a recognised business status and mercantile integrity. It was not also urged before us that the absence of a telephone with the liaison officer of such group companies at Madras would not matter. On the other hand, the appellant insisted that he was not negligent and that all possible efforts were made by him to ease the situation. As we said, the methodology adopted by the bank in a serious situation like this is not a satisfactory one and in a case like this we should characterise such a slow and

haphazard movement of a responsible bank as negligence on its part. The *causa causans* of the dismissal of the plaintiff's service is therefore attributable to the conduct of the bank which we find is far from reasonable and indeed abounding in negligence.

11. The word 'compensate' used in section 31 has special signification in the context in which it is used. The well-understood proposition in law is that damages are awardable if a sufficient nexus is established between the wrongful act and the resultant loss to the injured. This principle laid down in section 73 of the Contract Act is a well-known one. Under this section, the measure of compensation for any loss or damage caused in case of breach of contract is fixed as that which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it and such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach. Adopting this as the standard or yard-stick by which damages have to be awarded in case where a party suffers an injury by reason of the negligence or negligent conduct of another, it is essential that the party complaining of such an injury or claiming such compensation should be in a position to connect the injury with the act of malfeasance or misfeasance or negligence on the part of the other party. Besides creating such a nexus, he should also prove that the resultant damage has flown from the event of negligence. As between a banker and a customer, statute law itself makes it mandatory that the injured customer should be compensated for the wrongful act of the banker. We have seen this in section 31 of the Negotiable Instruments Act. But in all such cases a distinction has been made between compensation which has to be paid to a trader and that which has to be paid to a non-trader in cases of proved injury caused at the instance of the banker. The banker's failure to honour his customer's cheques and drafts when he has moneys of the customer to meet them, is a peculiar type of breach of contract which has certain significations attached to it. As pointed out by McGregor on Damages, Thirteenth Edition, at page 917:

> "The important characteristic of such cases is that the plaintiff, where a trader, can recover substantial damages for injury to his credit without proof of actual damage".

The reason has been explained by the learned author with reference to decided cases thus:

> "The *ratio decidendi* in such cases is that the refusal to meet the cheque, under such circumstances, is so obviously injurious to the credit of a trader that the latter can recover, without allegation of specific damage, reasonable compensation for the injury done to his credit: but this rule does not apply where the customer is not a trader: in such cases substantial damages cannot be awarded without proof of actual injury to credit".

This distinction has been well brought out by many decided cases in Courts in our country.

In ***Mohammed Hussain* v. *Chartered Bank*** [AIR 1965 Mad. 266], which was later approved by a Bench of our Court in O.S.A. No. 52 of 1964, Sadasivam, J., after reviewing the English authority said that "a negligent act may be the effective cause of an injury though it may not be proximate in time, if it is the particular incident, in a chain of events which has

in fact led to the injury, that is, if it is the real cause of subsequent accident. To determine responsibility the law will consider the proximate and not the remote cause of an injury."

The learned Judge referred to the observations of Tindal, C.J., in ***Davis* v. *Carret*** [130 ER 1456, 1459, 1030] in the following terms:

> "(N)o wrongdoer can be allowed to apportion or qualify his own wrong and that as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done."

The learned Judge also approved of the distinction which is invariably made between traders and non-traders in the matter of recovery of damages from a negligent banker. The line thus drawn between a trader and a non-trader in the matter of recovery of compensation from a defaulting banker is traceable to the well-known principle that the credit of a trader if marred and injured without reasonable cause is likely to totally mar his reputation and credit in the market and it is this that prompted courts of law to award substantial damages to a trader in case of wrongful dishonour of cheques as against the banker without proof of actual loss to the customer. As against this, in so far as a non-trader is concerned, it is but reasonable to expect proof of such special damage claimed by him so as to entitle him to recover the same. As secrecy is maintained as between a non-trader-customer and his banker, the fact that a particular cheque, big or small, has been dishonoured would only affect the particular customer and the prestige of that customer but it would not have a deleterious effect in the eye of the community at large. On account of this concept which is found in the ratio of such decisions that courts call for proof of special damage in case the subject-matter relates to the dishonour of cheque of a non-trader.

12. Bearing these principles in mind, it is for us to assess the quantum of damages to which the plaintiff is legitimately entitled to in the instant case as found by the trial Court and as accepted by us and consider whether there has been proof of such special damage in the instant case by the plaintiff-respondent. So long as the damages claimed is not remote and purely speculative, Courts are bound to consider the reasonable requests of injured parties and grant them proper relief. The plaintiff was earning a sum of Rs. 600 per month with his employers. He got an employment between 1964 and 1966. This was taken into account by the learned trial Judge in assessing the special damages to which the plaintiff would be entitled to by reason of the consequential dismissal of the plaintiff from the employer's service. We have no hesitation in finding that the dismissal was due to the dishonour of the cheque which resulted in the telephone being cut off. He claimed special damages of Rs. 36,000 it being the probable salary which he would have got for a period of five years from the date of termination of his service, since on the date of termination he was 50 years of age. The trial court did take every aspect into consideration and estimated the special damages at Rs. 10,000 to the plaintiff and we agree with the Court below that the quantum of damages granted is a reasonable assessment of the same having regard to the situation in which the plaintiff was placed. We may add that in the appeal before us there was no serious argument against the quantum of damages awarded by the Court below. In addition to a sum of Rs. 10,000 awarded as special damages, a sum of Rs. 4,000 as general damages towards loss of prestige, status and mental agony was also granted. The claim of the plaintiff was that

he was entitled to a sum of Rs. 14,000 under this head. But the learned Judge awarded Rs. 4,000 as general damages. This again was not attacked by the learned Counsel for the plaintiff. We, therefore, confirm the decree of the trial Court in the sum of Rs. 14,000 as against the defendant as special and general damages together with interest at 6 per cent per annum from the date of judgment of the court below till date of payment. The respondent shall carry out the special directions issued by the trial Court in paragraph 32 of its judgment in the matter of the payment of Court-fee due to Government. The appeal is therefore dismissed with costs.

* * * * *

London Joint Stock Bank Ltd. v. *Macmillan*

(1918-19) All ER Rep 30

LORD SHAW - The facts of this case are very simple, and they have been told by your Lordships who preceded me. The case is one between banker and customer. It is almost as important, in view of the large citation of authority which has been made in the courts below and at the Bar of this House, to keep in mind some things which are not part of this case as those things which are. In the first place, not only is this not a case between the drawer and the acceptor of a bill or between the acceptor and a holder of the bill in due course, but it is not the analogue of such a case. The reason that I state this in the forefront of my opinion is that it disposes at once of a considerable body of authority which was cited as relevant to the consideration of the present suit. The distinction between a case of the latter sort and of the present was very clearly brought out in ***Scholfield* v. *Earl of Londesborough*** [(1894) 2 Q.B. 660] by LORD WATSON and by LORD DAVEY. In the words of the former, which are directly applicable to the present case:

> "(T)he duty of the customer raises directly out of the contractual relation existing at the time between him and the banker, who is his mandatory. There is no such connection between the drawer or acceptor and possible future endorsees of a bill of exchange."

In the next place, on the facts before us themselves the elements are of the simplest. It is the case of a customer drawing a cheque in his own favour from his banker. There is no complication as to the cheque having passed to a payee, third party, nor is there any question accordingly as to any conduct or misconduct on the part of such payee. The case is direct in that sense. Nor is there any question of the genuineness of the signature; it is admitted to be genuine. I state this elementary point because it disposes again of a considerable portion of the authorities cited to us in regard to forged cheques. A cheque with the signature of a customer forged is not the customer's mandate or order to pay. With regard to that cheque, it does not fall within the relation of banker and customer. If the bank honours such a document not proceeding from its customer, it cannot make the customer answerable for the signature and issue of a document which he did not sign or issue; the banker paying accordingly has paid without authority, and cannot charge the payment against a person who was a stranger to the transaction.

The case, then, must be taken as the simplest one namely, of a cheque duly signed, forwarded on behalf of the customer to the banker, and honoured. There are in these circumstances reciprocal obligations. If the cheque does not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation, and the consequences to both parties of the dishonour of a duly signed and ex facie valid cheque are serious and obvious. In the second place, if there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with, then that, in the usual case, is met by the marking "refer to drawer", and by a delay in payment, until that reference clears away the doubt. Always granted that the doubt was reasonable, the refusal to pay is warranted. These

obligations on the banker do not, of course, exist until after the cheque has been presented. Upon the other part there are obligations resting upon the customer. In the first place, his cheque must be unambiguous and must be ex facie in such a condition as not to arouse any reasonable suspicion. But it follows from that, that it is the duty of the customer, should his own business or other requirements prevent him from personally presenting it, to take care to frame and fill up his cheque in such a manner that when it passes out of his (the customer's) hands it will not be so left that before presentation, alterations, interpolations, etc., can be readily made upon it without giving reasonable ground for suspicion to the banker that they did not form part of the original body of the cheque when signed. To neglect this duty of carefulness is a negligence cognizable by law. The consequences of such negligence fall alone upon the party guilty of it namely, the customer.

It appears to me that a crucial consideration in a case such as the present is this: What is the point of time at which these respective obligations meet. The point of time is the presentation of the cheque. Not until that moment is the banker confronted with any mandate or order, and, in my opinion, the responsibility for the cheque and all that has happened to it between its signature and its presentation is not and ought not to be laid upon the banker. If at that moment three things are satisfied namely, (i) that the cheque is duly signed, (ii) that its appearance and statement of contents present no reasonable ground for suspicion, and (iii) there are customer's funds available then the banker is bound to pay. But if a banker were bound to inquire, in regard to every cheque with quite genuine signatures, what had been their history from the time that the customer lifted his pen from the cheque until the time when it was presented at the bank, banking business would be greatly impeded or impossible, and, in my humble view, it would be subjected to risks for which there is no foundation in legal principle. It is entirely different, however, on the matter of this intervening period, with regard to the obligations of the customer. When a customer makes a cheque payable to himself or bearer it is entirely at his option when to present it. The responsibility for what occurs between signature and presentation, a period in his control, lies entirely with him. If, as in the present case, he gives it to a clerk, who tampers with it in such a way that no man of ordinary skill can find the roguery out, there does not seem to me to be any foundation in law for discharging the customer from the responsibility for these events or for laying them upon the banker, who was in no sort of position either of control over or participation therein. It may be true it is true in this case that what happened in the meantime to increase the nominal value of the cheque and to deceive all parties was a crime. But it was a crime brought about during this period of the customer's responsibility, and, as frequently happens in such cases, the crime of the customer's own servant. Accrodingly, the condition of the cheque has been altered, not only during the period of the customer's responsibility, but by the act of some person with whom he had left the document in charge. If it is suggested that this is a hardship upon the customer (abating for the moment the obvious consideration that it is still harder for the banker) the answer of the general case is obvious namely, that it is part of the customer's duty to fill up his cheque in such a way as to prevent roguery being made easy.

I do not here pronounce any judgment upon another type of case which may be figured. I refer to a case in which there has been no negligence on the part of the customer in the respect last alluded to, but in which erasures of great skill or deletions, say accomplished by

chemical aid, have been made upon a cheque so as to undo all the case properly exercised by the customer in regard to its contents. Yet I cannot conceal from your Lordships that I should have the greatest doubt whether this kind of roguery having been practised during that period of responsibility on the part of the customer to which I have referred the customer would not also be liable. But the present is not a case of that kind. It is a case of negligence, and it is necessary to state again that in which the negligence consists. The negligence consists in the breach of a duty owing by the customer to the banker. That duty is so to fill up his cheque as that when it leaves his hands a signed document it shall be properly and fully filled up, so that tampering with its contents or filling in a sum different from what the customer meant it to cover shall be prevented. This is the sole ratio of the blank cheque decisions. The customer in such cases is bound to accept the responsibility for whatever the contents of the cheque may be, if he has allowed a cheque to pass out of his hands blank. The present case was upon its facts a very near approach to that of a blank cheque; a figure "2" was upon it with space before and behind it which easily permitted the "2" being turned into "120". As for the words of the cheque, these were wholly blank and the clerk to whom it was entrusted filled in the words "one hundred and twenty pounds." In that condition it was presented to the bank and honoured. I ask myself: so far as the banker was concerned, what difference did it make to his obligation to pay, that between the time when his customer signed it, and his customer's servant presented it, the servant had filled up that cheque from being a blank to what it was, or from being a cheque with a figure "2" to what it was?, and I ask myself with regard to the customer, what difference does it make in principle that the cheque is left by him entirely blank or is left so blank that the contents finally appearing on it may so appear without arousing the slightest suspicion? There is a suggestion in some of the judgements below that the limitation of the authority to the clerk was a limitation to £2 because of the isolated figure "2." That was a limitation of authority only indicated to the clerk, and no care was taken that such a limitation of authority should reach the knowledge of the banker. So that in truth, my Lords, for all practical purposes and so far as the banker was concerned the same limitation of authority could have been pleaded, although the figure "2" had not been inserted, and that by simply establishing that the clerk knew perfectly well that it was to be a £2 and nothing more. The roguery would have been little more and little different than it was whether the cheque had been entirely blank or with the figure "2" placed where it stood. It does not appear to me that on principle the duty of properly and fully filling up the cheque is met by what was done in the present case. It is no doubt true that, had the cheque been presented as signed, it might have been honoured without impropriety, but when a cheque is not presented as signed and has been tampered with before presentation, the question whether the customer has been negligent in a duty that lay upon him of so filling up his cheque as to prevent such tampering, if answered in the affirmative, absolves the banker if the latter has paid on an ex facie unsuspicious document.

I had intended to go over in detail the authorities from ***Young* v. *Grote*** [(1827) 4 Bing. 253] downwards; but this is unnecessary, and I think it would be presumptuous in me to do so after the full treatment thereof by my noble and learned friend on the Woolsack. I express my entire agreement with his Lordship's narrative and conclusions upon that subject. In particular I desire to say that ***Young* v. *Grote*** was rightly decided. I may further indicate my view that many subsequent decisions which have referred to it have introduced a certain embarrassment into this portion of our law, not because of what is said in ***Young* v. *Grote*** itself, but of what later judges, even while approving the decision, thought must have underlain it. Not a word is said, for instance, in ***Young* v. *Grote***, about estoppel. It may be that some such doctrine was in the judges' minds in deciding it. I am not enough of a psychological expert to say. It is enough for me,

agreeing as I do entirely with the result of the decision, to observe that I think it safest to place the case upon the grounds which the judges themselves put it. It was treated by them as a case of negligence. As BEST, C.J., said: 'We decide here on the ground that the bank has been misled by want of proper caution on the part of his customer." PARK, J., concurred with the arbitrator on the fact of negligence. "Great negligence" was the reason assigned by GASELLEE, J. And, said BARROW, J., "the blame is all one side." That was the ground of his judgment. I do not think it expedient to speculate upon anything deeper than or different from that, and, as I say, I think the course of the law has been disturbed by speculations of that order. It is true that BEST, C.J., founded upon certain sentences of POTHIER, but these sentences seem, like ***Young* v. *Grote*** itself, to be perfectly apposite to the present case and to be entirely sound. I think this sentence of POTHIER'S may be held as a plainly statement of the law of England and Scotland on the subject in the present day. ***Young* v. *Grote*** has been approved, by a preponderating body of decisions and in the highest quarters, since its date. I beg to say, however, that I express no surprise that great difficulty was felt upon this topic in the courts below. That difficulty is caused for two reasons. The first I have already alluded to namely, the speculations made in subsequent cases as to what underlay or was supposed to underlie that judgment. Alongside of these explorations des arrières pensèes, it is consoling to be able to place the few simple sentences in which the judges in ***Young* v. *Gorte*** pronounced their own opinions. There was also a certain note of invitation to review in the language used by LORD HALSBURYin ***Scholfield*** case, although it has to be borne in mind that the learned Lord's doubts and queries were answered in the case itself by the other four learned Lords who sat with him.

A very substantial difficulty, however, has been caused by ***Colonial Bank of Australasia, Ltd.* v. *Marshall*** [(1906) A.C. 559], to which great respect has to be paid. In that case, as the judgment of SIR AUTHUR WILSON undoubtedly shows, the crux of the decision was the opinion expressed in these words – namely, that the duty which

> "subsists between customer and bank is substantially the same as that contended for in ***Scholfield* v. *Earl of Londesborough*** as existing between the acceptor and the holder of the bill."

In my opinion, this was erroneous, and I illustrate the error not only by the passage from LORD WATSON already quoted, but by the following citation from LORD MACNAGHTEN. Referring to the report in BINGHAM he says:

> "the court went very much on the authority of the doctrine laid down by POTHIER that in cases of mandate generally, and particularly in the case of banker and customer, if the person who received the mandate is misled through the fault of the person who gives it, the loss must fall exclusively on the giver. That is not unreasonable; but the doctrine has no application to the present case. There is no mandate as between the acceptor of a bill and a subsequent holder."

I humbly think ***Colonial Bank of Australasia, Ltd.* v. *Marshall*** to be in conflict with the great and binding authority of ***Scholfield*** and I do not see my way to follow it.

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Allampati Subba Reddy v. *Neelapareddi Ramanareddi*

AIR 1966 AP 267

GOPAL RAO EKBOTE, J. – This revision petition arises out of a suit instituted by the petitioner-plaintiff for the recovery of a sum of Rs. 1,864 on the foot of a promissory note, dated 29-7-1959. The principal defence with which I am concerned in this revision petition was that the promissory note was not executed on 29-7-1959, but it was executed on 22-7-1959. It was contended by the defendant that in order to bring the suit within limitation the plaintiff after erasing the figure '2' has rewritten the figure '9'.

2. The lower Court after proper enquiry found that there has been a material alteration in the promissory note and that the date was changed from 22nd to 29th in order to bring the suit within limitation. The suit was filed on 30th July 1962, 29th being a holiday.

3. The main contention of Mr. A Kuppuswamy, the learned Counsel for the petitioner, is that when the defendant even before inspecting the suit document took a stand that the promissory note was really executed on 22nd July, 1959 and not on 29th July 1959 and when in support of that contention he stated in his deposition that he has a diary with him, which was not produced, adverse inference ought to have been drawn against him and it ought to have been held that the suit promissory note was not materially altered and that it was really executed on 29th July, 1959.

4. After going through the judgment of the Court below I find that the lower Court has not believed the defendant's evidence in that behalf, and also did not believe the evidence adduced by the plaintiff. It is pertinent to note that the lower Court reached the conclusion after examining the promissory note that the figure '9' is re-written after the old figure has been erased. In view of that suspicious nature of the document it held that material alteration has taken place. I do not in these circumstances feel that the production of the diary could have any effect upon the suit. Even otherwise the lower Court has disbelieved the defendant's evidence. It did not also believe the plaintiff's evidence. The position, therefore, is that there is no reliable evidence on either side of the parties. A careful examination of the suit promissory note, however, reveals that some figure was there in the place of '9', which was erased and the figure '9' was subsequently written upon it. That this is so is clear because at the place where erasure has taken place the thinning of the paper is clearly seen. That is why when figure '9' was written the ink has spread. There can be no doubt that the lower Court was correct in treating the document as suspicious in view of the abovesaid circumstance. When there is no evidence on either side explaining about this suspicious nature of the document what course should the Court take is the real question which arises in the case.

5. The law on the point seems to me to be clear. The English rule that a material alteration of a date makes it altogether void is summarised thus in **Halsbury's *Laws of England,*** III Edition, Vol. 11, p. 367, Paras. 598 and 599:

> "598. A writing proposed to be executed as a deed may be altered by erasure or interlineation or in any other way before it is so executed; and any alteration so made before execution does not affect the validity of the deed. Any alteration, erasure or

interlineation appearing upon the face of a deed is presumed, in the absence of evidence to the contrary, to have been made before the execution of the deed."

"599. If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. The avoidance, however, is not ab initio, or so as to nullify any conveyancing effect which the deed has already had; but only operates as from the time of such alteration, and so as to prevent the person, who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound thereby, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made."

6. The law is not otherwise in India. The abovesaid rule is quoted with approval in several Indian decisions. Section 87 of the Negotiable Instruments Act statutorily adopts the said rule.

It must be remembered that it is not any and every alteration that avoids the instrument. To have that effect the alteration must be in a material particular. A material alteration can be brought about by change of date or time of drawing or of the place of payment or by change in the sum payable, etc., etc. It is thus evident that the date of a promissory note is a material portion of it, and any alteration of such date will naturally avoid the promissory note, unless, of course, as stated in the Section, such an alteration is made with the consent of the other party, or is made to effectuate the common intention of the original parties. It is wrong to assume that the date of the promissory note is merely a description. It indicates the time when the promissory note was executed. In most cases the date is very material in calculating the date of the performance of the contract and more often fixing the period of limitation within which the plaintiff will have to institute the suit on the foot of such promissory note. It is immaterial whether the alteration is made in the date or month or year. Any such alteration being material must necessarily result in the avoidance of the promissory note.

7. It is true that in two cases alterations, though material, do not vitiate the instrument, firstly, when the alteration is made before the promissory note is executed, and secondly, if the alteration made was merely to correct a mistake or to make it what it was originally intended to be. As stated earlier, the Section (S. 87) itself states that the alteration can be made with the consent of the parties, or to carry out the common intention of the original parties. Any mistake occurring before the execution of the promissory note can, however, always be corrected before the document is actually executed.

8. The general rule in English law followed in India that a party having custody or control of a document produced in evidence must explain the alteration. When the instrument on its production appears to have been altered, it is a general rule that the party offering it in evidence must explain its appearance, because every alteration in the case of a negotiable instrument renders it suspicious. It is only reasonable that the party claiming under it should remove the suspicion. It is true that it is not on every occasion that a party tendering an instrument in evidence is bound to explain any material alteration that appears upon its face. He must, however, explain when he is seeking to enforce it. It is plain that when the alteration appears to have been made contemporaneously with the document, or if it is made at some subsequent period with the privity of the parties charged and there is nor fraud, it does not affect the validity of the instrument.

9. It is thus evident that where the instrument appears to be altered it is incumbent upon the holder, that is, the plaintiff, to show that the alteration is not improperly made. It is not fairly settled that in case of negotiable instrument the presumption is that the alteration was made subsequent to the issue of instrument. What must follow is that when a promissory note appears to have been altered or there are marks of erasures on it, the party seeking to enforce the promissory note is bound to satisfy the Court that alteration does not avoid the promissory note by explaining how the alteration has been effected. If it falls under any one of the exceptions mentioned above, it is obvious that such an alteration will not fall within the mischief of S. 87 of the Negotiable Instruments Act.

10. Where an instrument appears to be materially altered the law naturally casts a heavy burden on the plaintiff to explain the alteration and show when it was made. Ordinarily the party who presents a negotiable instrument which is an essential part of his case in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of the instrument unless it can satisfactorily explain the existing state of the document. It is true that this wholesome rule is not without its exceptions. If there be, for example, independently of the instrument corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence, there must however, be an explanation and such a strong proof to rebut the initial presumption. It is relevant to note that the presumption under the English Law is that in the case of deeds signed and sealed, alterations were made before execution, but no such presumption exists in the case of negotiable instruments. That being the position of law as I understand it, let me see whether any explanation was offered by the plaintiff about the suspicious nature of the suit promissory note. I have already stated that on examination of the document it becomes clear that there are marks of erasure and the figure '9' is re-written in the manner in which it mentioned above. There can be little doubt that the date which is material looks to be altered. In such circumstances it was for the plaintiff who seeks to enforce this promissory note to explain to the Court as to when and how this alteration was made. The plaintiff in his deposition denies any correction. He has no explanation to offer in case it is found that the date appears to be materially altered. In the absence of any explanation on behalf of the plaintiff who seeks the enforcement of the document, it is obvious that the plaintiff must fail, as the onus was on him to show that the material alteration was made either with the consent of the parties or in order to effectuate the common intention of the parties. In the absence of any such plea the presumption, as stated earlier, is that the material alteration was made subsequent to the execution of the document. In view of that presumption the irresistible conclusion is that the suit promissory note is void under S. 87 of the Negotiable Instruments Act and it cannot, therefore, be enforced in a Court of law. In ***Herman* v. *Dickinson*** [(1828) 130 ER 1031], it was held as follows:

> "(W)here an alteration appears upon the face of a Bill the party producing it must show that the alteration was made with consent of the parties, or before issuing the bill."

To the assume effect is ***C.S. Pillay* v. *K.K. Konar*** [AIR 1935 Rang. 131]. I am, therefore, satisfied that the plaintiff has failed to offer any explanation, and also failed to prove that the material alteration appearing on the face of the promissory note was made with the consent of the parties, or was made in order to effectuate the common intention of the parties. His suit, therefore, was rightly dismissed on the ground. This revision petition, therefore, is dismissed.

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Shivalingappa v. *P.B. Puttappa*

AIR 1971 Mys. 273

V.S. MALIMATH, J. – The respondent plaintiff brought the suit to recover a sum of Rs. 2,635/-, which includes principal amount of Rs. 2,000/- and interest thereon. The suit is based on the pronote dated 9-2-1961 executed by the defendant in favour of the plaintiff. He, however, pleaded discharge to the extent of Rs. 2,000/-. The defendant did not deny the execution and consideration of the pronote. He, however, pleaded discharge to the extent of Rs. 2,000/-. The defendant further took a specific stand that the pronote in question has been materially altered by the plaintiff. The defendant's case is that at the time of Navarathri in the year 1961, he paid a sum of Rs. 2,000/- to the plaintiff and made an endorsement on the back side of the pronote about the payment of the said sum of Rs. 2,000/- to the plaintiff. The defendant's case is that the said endorsement was made in pencil and not in ink, as no pen was available at that time. The defendant has further stated that the plaintiff has erased the endorsement made by him and that is the material alteration of the pronote. Relying on the provisions of Section 87 of the Negotiable Instruments Act, the defendant contended that the pronote has become void and unenforceable. The plaintiff denied the discharge pleaded by defendant to the extent of Rs. 2,000/-. He further asserted that no endorsement, whatsoever, was made on the back of the pronote by the defendant. He also asserted that no erasure was made, as alleged by the defendant.

2. The learned Munsiff dismissed the plaintiff's suit. He came to the conclusion that the pronote has been materially altered, as contended by the defendant. He appears to have come to the conclusion that the discharge pleaded by the defendant to the extent of Rs. 2,000/- was established.

3. The lower appellate court reversed the decree of the trial court and decreed the plaintiff's suit. The learned Civil Judge came to the conclusion that the pronote has not been materially altered. He held that the discharge pleaded to the extent of Rs. 2,000/- has not been satisfactorily established.

4. It is the legality of the decree passed by the learned Civil Judge in appeal that is challenged in this second appeal under Section 100 of the Code of Civil Procedure.

5. Shri Swamy, the learned counsel for the appellant contended that the finding of the learned Civil Judge that the pronote has not been materially altered, is not in accordance with law. In order to satisfy myself, I perused the pronote. The pronote is on a printed form. The alleged alteration of the pronote is on the back side of the pronote. The back side of the pronote is blank and nothing whatsoever is found written there at present. Shri Swamy pointed out that the texture of the paper on the side somewhere near the middle on the top side indicates that some erasure of some writing has been made. He relied upon the evidence of the hand-writing expert to whom the document was sent who has given an opinion that there is some erasure of some writing on the back side of the pronote. In order to prove that an endorsement was made by the defendant on the back side of the pronote, which has subsequently been erased by the plaintiff, the defendant has not only examined himself but also examined one Shankarappa. The learned Civil Judge has assessed the evidence of the

defendant and his witness, Shankarappa. He has observed that Shakarappa, is a chance witness whose evidence is not worthy of acceptance. I do not find any good reasons to disagree with the conclusion of the learned Civil Judge. As the defendant has not established that an endorsement was made on the back side of the pronote in pencil, the question of erasing the alleged endorsement does not arise.

Shri Swami contended that the evidence or opinion of the hand-writing expert to the effect that something was written on the back side of the pronote which has been erased has been accepted by both the courts below. He, therefore, contended that his client has established that there is an alteration in the pronote. As the pronote was in the custody of the plaintiff all along, Shri Swamy urged that it is for the plaintiff to explain satisfactorily the erasure that is found on the back side of the pronote. The plaintiff has asserted that there was no writing on the back side of the pronote and that he has not erased any such writing on the back side of the pronote. Merely on the basis of the vague type of evidence of the hand-writing expert it is difficult to hold that there was some writing on the back side of the pronote which has been erased by the plaintiff when the document was in his custody. Even otherwise, I find it difficult to accede to the contention of Shri Swamy that Section 87 of the Negotiable Instruments Act can be invoked in the facts and circumstances of this case. It is not disputed that no part of the promissory note as such has been altered in any manner whatsoever. Even if the entire contention of the defendant is accepted, it would only mean that an endorsement made by the defendant on the back side of the pronote has been materially altered by the plaintiff.

As already noticed no part of the pronote is written on the back side of the document. The entire pronote has been completed only on one side of the paper. Section 87 of the Negotiable Instruments Act contemplates material alteration of a negotiable instrument. If there is a material alteration of a negotiable instrument, the same renders the document void against any one who is a party thereto at the time of making such an alteration and does not consent thereto unless it was made in order to carry out the common intention of the original parties. The endorsement which is alleged to have been made on the back side of the pronote does not form part of the negotiable instrument. It is an independent transaction, unconnected with the negotiable instrument in question. The alleged endorsement could as well have been made on an independent piece of paper and not on the back side of the pronote. Merely because an endorsement has been made on the back side of the pronote, it does not become part of the pronote. As the endorsement in question is not a part of the negotiable instrument, any alteration in the said endorsement does not attract the penal provisions of Section 87 of the Indian Negotiable Instrument Act. Hence, even if the entire case of the defendant about the endorsement of the pronote is true, the same does not, in any way, render the pronote (Ex. D-1) void under Section 87 of the Negotiable Instruments Act. There is, therefore, no substance in the contention of Shri Swamy that the plaintiff's suit is liable to be dismissed on account of the alleged material alteration of the endorsement on the back side of the pronote Ex. D-1.

6. The learned Civil Judge, after assessing the evidence on record, has recorded a finding of fact to the effect that the defendant has failed to prove the discharge pleaded by him to the extent of Rs. 2,000/-. That finding is not liable for interference in this second appeal.

7. For the reasons stated above, this appeal fails and the same is dismissed.

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L. Pirbhu Dayal v. *The Jwala Bank*

AIR 1938 All. 374

MOHAMMAD ISMAIL, J. – The plaintiff is a customer of the defendant bank. On 16th March 1936 cheque No. 23958 for Rs. 57-8-0 was presented at the bank purporting to have been signed by the plaintiff Pirbhu Dayal in favour of one Bhai Kashi Nathji. A servant of the defendant bank honoured the cheque and paid the amount to the person presenting the cheque. The plaintiff, on finding himself debited with this amount, informed the bank that he had not drawn the sum of Rupees 57-8-0 debited to him. The bank however refused to make good the amount on the ground that the cheque in question was received in the bank in the usual course of business and that the plaintiff's signature on the cheuqe fully tallied with his specimen signatures. The plaintiff thereupon brought the present suit. The learned Judge in the Court below, upon a consideration of evidence found that the signature on the forged cheque did not tally with the plaintiff's admitted signatures. It was also found that if the bank had acted with slight care and caution in the matter, the forgery could have been detected at once and the payment of the amount entered in the cheque would have been refused. Ultimately the Court below held as follows:

> Therefore, while holding that the bank was also quite negligent in ascertaining the signature of the plaintiff on the cheque in question, it was not legally liable to return the amount of the cheque to the plaintiff, as it has not been shown that the payment of the same was made by it dishonestly and knowing that it was a forged cheque.

The Court was further influenced by the fact that the plaintiff had admitted in his evidence that the cheque-book often remained in the small "*baithak*" of his house where other persons had also access and that the box containing the cheques remained unlocked in day time. Learned counsel for the applicant has assailed the finding of the Court below and has argued that the view of law taken by the Court below is erroneous. It has been held in numerous cases that a document in cheque form to which the customer's name as drawer is forged or placed thereon without authority is not a cheque but a mere nullity and that unless the banker can establish adoption or estoppel, he cannot debit the customer with any payment made on such a document. In the present case, there is a finding that the cheque in question was forged and the signature on the cheque bore no resemblance to the admitted signatures of the plaintiff. It was therefore incumbent on the defendant bank to show affirmatively that the servants of the bank were misled by some negligence on the part of the plaintiff which led them to cash the cheque. In ***Bhagwan Das* v. *Creet*** [(1903) 31 Cal 249], it was held that when a banker makes a payment on a forged cheque, he cannot make the customer liable, except on the ground of negligence imputable to the customer. The only negligence imputed to the customer in the present case is that he did not take sufficient care of his cheque-book and because of that some one was in a position to steal a form from the cheque book which was utilised in drawing money from the defendant bank. In ***Bank of Ireland* v. *Trustees of Evan's Charities*** [(1855) H.L.C. 389, 410], Mr. Baron Parke observed as follows:

> If such negligence could disentitle the plaintiffs, to what extent it is to go? It a man should lose his cheque-book or neglect to lock the desk in which it is kept, and a

> servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal? It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney.

The following passage from **Beven on *Negligence***, Edition 4, Vol. II, Chap. 3, p. 1471, has been relied upon by learned counsel for the applicant:

> The banker's obligation is to honour his customer's cheque. To that end he is bound to know his customer's handwriting. If in any way he is deceived without the instrumentality of his customer, he must himself abide the loss.

The main reason for dismissing the claim of the plaintiff was that he was negligent in leaving his book in an unlocked box. This negligence to my mind was not the proximate cause of the loss to the defendant bank. It was the duty of the employees of the bank to be able to identify the signatures of their customers and if they failed to discharge their duty and thereby suffered loss, there is no reason why the plaintiff should make good that loss. In ***Ahmed Moola Dawood* v. *Firm Pereinan Chetty*** [AIR 1924 Rang. 264], on similar facts it was held that the money paid by the bank under a forged cheque could not be debited to the customer merely on the ground that the customer was negligent to this extent that he allowed his cheque-book to remain unlocked. The following observations of the learned Judges strongly support the contention of the applicant:

> That it would not be sufficient to make appellants bear the loss which resulted from the forgery of a cheque stolen from their cheque-book and the fraudulent use of their stamps, if the respondents bankers cashed the forged cheque and have not been able to establish such negligence as would in law render appellants liable. In order to make the customer liable for the loss, the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss.

Learned counsel for the opposite party has relied on R. 4 of rules of business, which runs as follows:

> Constituents should keep all bank cheque forms under lock and key, otherwise the bank is not responsible for any loss in this contention.

The loss in the present case was entirely due to the negligence of the employees of the bank in not comparing the signature on the forged cheque with the specimen signatures of the plaintiff. I see no reason under the circumstances to hold that the plaintiff was responsible for the loss that was sustained by the bank. In the result I allow the application, set aside the order of the Court below and decree the plaintiff's suit.

* * * * *

M/s. Tailors Priya v. *M/s. Gulabchand Danraj*

AIR 1963 Cal. 36

R.S. BACHAWAT, J. – On August 30, 1961, the plaintiff instituted a suit in the City Civil Court, Calcutta under Order XXXVII of the Code of Civil Procedure claiming a decree on a dishonoured cheque dated 29th July, 1961 drawn by the defendant and payable to the plaintiff or order. The cheque is crossed generally and is marked with the words "a/c payee only." Those words are written within the transverse lines of the crossing. The writ of summons in the prescribed form was served on the defendant on September 19. On September 25, the defendant filed a petition praying for extension of the time to make an application for leave to appear and to defend the suit. The Registrar rejected the petition on September 28. On October 6, the defendant filed another petition asking for leave to appear and to defend the suit. By an order dated October 7, 1961 the Judge dismissed this petition. The defendant has moved this Court in revision against this order and has obtained a rule. The revision case has been referred to this Bench under Chapter II R. 1 proviso (ii) of the Appellate Side Rules.

2. Mr. Sen for the defendant contended that the cheque dated the 29th July, 1961 is not a negotiable instrument within the meaning of Sec. 13 of the Negotiable Instruments Act, 1881 and that a suit on it under Order XXXVII, C.P.C. was not maintainable at all and in any event was not triable by the Judges of the City Civil Court.

3. Now Order XXXVII, C.P.C. bears the heading "Summary Procedure on Negotiable Instruments." Rule 2 of Order XXXVII, C.P.C. however enables the plaintiff to institute a suit under the summary procedure upon "bills of exchange, hundies or promissory notes." The rule makes no distinction between negotiable and non-negotiable bills of exchange. The heading, cannot control the clear and express enacting words of the rule and limit its operation to negotiable instruments as defined in Sec. 13 of the Negotiable Instruments Act, 1881.

4. The notification dated December, 14, 1958 published in the Calcutta Gazette on December 11, 1958 stated that "in exercise of the Power conferred by Cl. (b) of R. 1, O. XXXVII of the Code of Civil Procedure, 1908, the Governor is pleased to specially empower the Chief Judge and the Judges of the City Civil Court, Calcutta to try summarily suits on Negotiable Instruments." By R. 1(b) of O. XXXVII C.P.C. under which the notification was issued, the whole of the order is extended to courts specially empowered in that behalf by the State Government. The clear intention of the notification is to extend the whole of the order to the City Civil Court and to empower its Judges to try summarily all suits triable under the order. The expression "negotiable instruments" in the notification is borrowed from the heading of Order XXXVII, C.P.C. In both places the expression indicates bills of exchange, hundies and promissory notes referred to in the body of Order XXXVII, C.P.C. Even Act XXVI of 1881, though called the Negotiable Instruments Act, 1881 deals with instruments both negotiable and non-negotiable; by way of example see Secs. 4 and 5 of the Act.

5. A cheque marked "a/c payee only" is a bill of exchange and consequently the plaintiff is entitled to institute a suit on it under O. XXXVII, C.P.C. and the Judges of the City Civil Court are empowered to try the suit. In this view of the matter the question whether such a

cheque is a negotiable instrument within the meaning of Section 13 of the Negotiable Instruments Act, 1881 does not arise for decision in this case and consequently we ought not to express any opinion on the question. I notice that, according to English decisions, the marking "a/c payee" on a crossed cheque payable to order or bearer is no part of the crossing: the words do not restrict the transferability, nor it seems the negotiability of the cheque, the words refer to the banker and not to the transferee and constitute a direction to the banker that the proceeds of the cheque collected by him are to be placed to the credit of the payee specified in the cheque. The collecting banker may lose his statutory protection if he disregards the direction. In practice the collecting banker usually declines to take a cheque so marked for an account other than that of the payee and the marking therefore indirectly restrains the negotiability of the cheque. The position of the paying banker honouring the cheque with the knowledge that the proceeds of the cheque are going otherwise than to the specified payee is not quite clear. And it seems that a cheque marked "a/c payee only" has the same significance as a cheque marked "a/c payee".

6. Mr. Sen next contended that the trial Judge wrongly refused leave to defend the suit. There is no substance in this contention. By Art. 159 of the Indian Limitation Act 1908, an application for leave to appear and to defend the suit must be made within 10 days from the date of the service of the writ of summons. No such application was made within the time prescribed. Consequently, the trial Judge was bound to refuse the leave. The application for extension of time to make the application for leave to defend the suit was misconceived. The trial Judge had no power to extend the time. This application for extension of time ought to have been disposed of by the trial Judge and not by the Registrar but this irregularity does not affect the decision in the case.

7. I should refer to one other matter, R. 2 of Order XXXVII, C.P.C. enables the plaintiff to institute a suit by presenting a plaint in the form prescribed. As yet this Court has prescribed no form of the plaint under Order XXXVII, C.P.C.. In the absence of a prescribed form of plaint, the plaintiff may maintain a suit under Order XXXVII, C.P.C. by presenting a plaint showing his cause of action on the instrument and indicating his intention to proceed under Order XXXVII, C.P.C. We pass the following order:

The Rule be and is hereby discharged.

D.N. SINHA, J. – 8. This matter has come before us in the following circumstances. A suit was filed under the summary provisions of Order XXXVII of the Code of Civil Procedure, by the plaintiff, Messrs. Gulabchand Dhanraj, against the defendant firm of Messrs. Tailors Priya, based on two dishonoured cheques, which have been endorsed and crossed with the words "a/c payee only", for the recovery of a sum of Rs. 4393.60 nP. in the City Civil Court, Calcutta, which has been given jurisdiction to try summary suits on negotiable instruments, vide Notification dated 14th December, 1958 (In exercise of the power conferred by clause (b) of Rule 1 of Order XXXVII of the Code of Civil Procedure). The writ of summons was served on the defendant on 19-9-61. The defendant appeared on 28-9-61 and filed a petition praying for ten days' time to apply for leave to defend the suit. The Registrar of the City Civil Court rejected this petition, and the suit was fixed for hearing ex parte on 6-10-61. Thereupon, the defendant made an application to Court for leave to defend the suit under

Rule 2 of Order XXXVII. Upon that, the Court passed an order dated 7th October, 1961 rejecting the application. It appears from the judgment of the learned Judge that two points were taken before him. The first was that the Registrar should not have dismissed the application for time in the manner he did, and the second point was that Order XXXVII of the Code of Civil Procedure did not apply at all, as the cheques being crossed "a/c payee" ceased to be negotiable instruments and, therefore, were not governed by the provisions of Order XXXVII of the Code of Civil Procedure. On the point, the learned Judge held that the crossing of cheque with the words "a/c payee only" did not restrain its negotiability, and the point accordingly failed. The learned Judge, therefore, directed the suit to be heard on 20-11-61. Thereupon, the plaintiff made an application to this Court in its civil revisional jurisdiction and a rule was issued. This rule came up for hearing before a Division Bench presided over by P. N. Mookerjee, J. It was pointed out that the Chief Judge and the Judges of the City Civil Court have been empowered to try suits on negotiable instruments, and that a point arose as to whether cheques crossed with the words "a/c payee only", came within the meaning of the term "negotiable instruments." The nature of a cheque indorsed and/or crossed with the words "a/c payee only" is a very important question, which constantly arises in the courts, and it is necessary to deal with it. The position with regard to a cheque indorsed or crossed with the words "a/c payee" or "a/c payee only" under the English law, has been summarised by Sheldon in his "***Practice and Law of Banking*** 6th Edn. page 78 as follows:

> " 'Account Payee' these words and variants such as "Payee's a/c," "Account A.B." etc., are often added to the crossing of a cheque. Such expressions have no statutory significance since they are not sanctioned by the Bills of Exchange Act, 1882; and if added, as they frequently are in practice, to order or bearer cheques, they do not in any way affect their negotiability.
>
> With regard to the paying banker, it is obvious that, after fulfilling his duty of paying the cheque in good faith and without negligence, his responsibility ceases and he cannot be expected to follow the money after it has reached the collecting banker, and insist upon the collecting banker paying it into the proper account. But the collecting banker is in a different position. These words are in the nature of a direction to him, and, if he places the money received to an account other than that of the specified payee, he stands to lose the protection of Sec. 82 on the ground of negligence. Hence the collecting banker should not collect cheques so marked, except for the named payees."

9. This principle has also been stated by Chalmers in his "***Bills of Exchange***", 12th Edn. page 253, in the following manner:

> "Of recent years the practice has sprung up of marking cheques with the words "account payee." This is not an addition to the crossing, but a direction to the collecting banker that the proceeds of the cheque are to be placed to the credit of the payee specified in the cheque. [See (1914) 3 KB 356, 373 CA]. It has been held
>
> (1) that the marking "a/c payee" does not restrict the negotiability of the cheque, [See (1891) 1 QB 435 CA] and

(2) that the cheque drawn payable to "T. C. and others or bearer", "a/c payee" is not payable to bearer, but should be credited to the account of "T. C. and others."

(3) where a cheque is marked "a/c payee only, not negotiable" and the payee indorses it to his banker for collection, the banker is a holder and indorsee of the cheque.

If, then, the collecting banker pays a cheque marked "a/c payee" otherwise than to that account, he does so at his own risk; presumably if he does not keep the payee's account he may refuse to handle the cheque."

10. Upon this point, we find the following statement of law in **Byles on *Bills*** 20th Edn. p. 45:

"The practice has arisen in recent times of adding to the crossing the words "account payee" or similar words. Sec. 78 does not prohibit the addition of these words, since they are a mere direction to the receiving banker. Though the word "payee" means the person designated in the cheque as payee and not the owner of the cheque at the time when it is presented, the words "account payee" are not sufficient, in the case of a cheque drawn to order or bearer, to make it non-transferable within the meaning of Secs. 8(1) of the Code. At the same time they operate as a caution to the collecting banker to put him on inquiry and disregard by him, in the absence of explanation, amounts to negligence on his part."

12. The law has been summarised thus in Halsbury's Laws of England" 3rd Edn. page 183 paras 3, 4, 7:

" 'Account payee.' The marking to a particular account, as "account payee" or "account of A.B.", has no warrant or recognition in the Bills of Exchange Act, 1882. It does not affect the transferability of the cheque. Nor it is submitted, does it affect its negotiability. This particular crossing has been in use too long for it to be disregarded, and it must be taken to convey an intimation to the collecting banker that the proceeds of the cheque are only to be placed to the specified account. It is therefore, the custom of most banks to decline to take the cheque for any other account, and a disregard of the intimation would probably be deemed negligence."

16. I now come to the provisions of the Indian Negotiable Instruments Act. Section 5 of the said Act defines a "Bill of Exchange" as being an instrument in writing containing as unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. Section 6 provides that a cheque is a bill of exchange drawn on a specified banker and not payable otherwise than on demand. Section 7 defines the word "payee" as being the person named in the instrument to whom, or to whose order, the money is directed to be paid. Section 13 defines a "Negotiable Instrument" which includes a cheque payable either to order or bearer. A cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable. Section 14 provides that when a cheque is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated. Chapter XIV of the said Act deals with the subject of crossed cheques.

Cheques may be crossed in two ways e.g. generally (section 123) or specially (Sec. 124). Where a cheque bears across its face, the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally. Where a cheque bears across its face in addition the name of a banker, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker. Section 129 provides that any banker paying a cheque crossed generally, otherwise than to a banker or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Section 130 lays down that a person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable", shall not have, and shall not be capable of giving a better title to the cheque, than that which the person from whom he took it had. Under the Indian Law as it stood previously, and the English Law before the Bills of Exchange Act, a person could draw a non-transferable cheque by simply omitting the word "order or bearer". But now, both under the Indian law and the English Law, one way to restrain negotiation of a cheque is by crossing a cheque with the words "not negotiable". A cheque crossed "not negotiable", may be transferred, but the transfer is not attended by the same important consequences as in the negotiation of a negotiable instrument. If the transferor had a good title, the transferee is entitled to receive payment. But if the title of the transferor is defective, the transfer is affected by such defects, and is not immune to the same, as is a holder for value in due course of a negotiable instrument. In other words, a cheque endorsed as 'Not Negotiable' is deprived of one of the two attributes of negotiability, viz., transferability free from defects; but is left with the other, namely transferability by delivery or endorsement. Thus, where a cheque is marked with the crossing 'not negotiable', there cannot be "a holder in due course", but only a "holder". Next, we come to section 50 of the said Act, which deals with the effects of endorsement. It provides that the endorsement of a negotiable instrument followed by delivery, transfers to the endorsee the property therein, with the right of further negotiation; but the endorsement may, by express words, restrict or exclude such right. Section 54 provides that, subject to the provisions contained in the said Act as to crossed cheques, a negotiable instrument indorsed in blank is payable to the bearer thereof even though originally to order.

17. It is thus found that a cheque is a negotiable instrument and may be transferred or negotiated by endorsement and delivery, making the endorsee the holder in due course. But unlike other negotiable instruments, there are specific provisions with regard to crossed cheques. Those provisions have been mentioned above. If the words "not negotiable" are used with special crossing, then it is still transferable but not negotiable. The Negotiable Instruments Act does not provide specifically for a crossing, "a/c payee" or "a/c payee only". At one time it used to be thought in England that such endorsement had no legal effect and it was even thought that such endorsement invalidated a cheque. However, the practice of making such endorsements is so widespread and has been going on for such a length of time, that it can no longer be said that such a crossing would invalidate a cheque. But, there has really been no satisfactory decision with regard to the legal consequences of such crossing. It

seems that the textbooks are unanimous in their opinion that an endorsement or crossing containing the words "a/c payee" or "a/c payee only" does not restrict the negotiability of the cheque. It is only a direction on the collecting banker to put the money into the account of the person shown as the payee, on the face of the cheque. The result is this: Supposing A issues a cheque in favour of B and crosses it "a/c payee only". B may negotiate it in favour of C, and C may negotiate it in favour of D and so on. The only result of such crossing is that when it is put into the hands of the collecting banker, the Banker is put on notice that the money must be put into the account of B only and not in any other account, and if it puts the money into some other account with notice of the crossing, it will be liable for negligence. I however fail to see the merits of this curious procedure. In the illustration given above, C may take the cheque from B and become the holder for value and yet if he goes to his banker and asks the banker to collect the money, the duty of the banker would be, not to put the money into C's account but into B's account, and if B has no account then the banker may refuse to accept the cheque at all. Under such circumstances, I do not see what benefit C has got by negotiation. It amounts to this, that he becomes a holder for value but without the right of getting his banker to collect the money!

18. This curious position in law is not known to the public at large. It is generally believed that by crossing a cheque with the words "a/c payee only", it is made non-negotiable. Indeed, such endorsements are made in order to render it non-negotiable, and as a measure of safety. In my opinion, the law on the point should be reconsidered and there is no reason why we should blindly follow the English Law on the point. However, the position seems to have been so uniformly accepted by textbook writers, both in England and India, that I am unable to depart from that view on the strength of my own feelings about it. The matter should however be corrected by legislation. I therefore hold that according to the law as it stands at present, a cheque payable to order or bearer and crossed "a/c payee" or "a/c payee only" but without the endorsement, "not negotiable", is a negotiable instrument, and may be negotiated, but the collecting banker has a duty to put the money, when collected, into the account of the payee indicated, and into no other account.

19. For the reasons aforesaid, this application fails and I agree with the order made by my Lord, Bachawat, J.

* * * * *

Great Western Rail Co. **v.** *London & County Banking Co. Ltd.*

(1900-3) All ER Rep. 1004 (HL)

Facts: H obtained from the appellants by false pretences a cheque payable to his order, crossed generally and marked 'not negotiable'. He took the cheque to a branch of the respondent bank where it was received in good faith and cashed, part of the proceeds being retained by the bank for the account of a customer of theirs and the balance handed to H. H had not and never had had, an account with the bank but they had been in the habit for many years past of cashing cheques for him as a matter of convenience. The bank crossed the cheque to themselves and received payment for it. In action by the appellants to recover the amount of cheque from the bank, the bank was not entitled for the protection afforded by section 82 of the Bills of Exchange Act, 1882, because (i) for a person to be a customer of a bank, within section 82 he must have either a deposit or a current account with the bank, or there must be some entry of debit or credit in a book or papers of the bank relating to his transactions, or some similar relation must exist, and, applying this test, H was not a 'customer' of the bank within section 82; (ii) in the circumstances the bank did not receive payment of the cheque for H within section 82 for the money in respect of the cheque had already been given to H in exchange for the cheque and so the money received by the bank when the cheque was prescribed was received, not for H, but for the banks own account for reimbursement; (iii) furthermore , H had never had any title to the cheque and it being marked 'not negotiable', under section 81 of the Act, the bank could not acquire a better title to it than H had, and the title to the money which the bank received, for the cheque was as defective as their title to the cheque itself; accordingly, the appellants were entitled to succeed.

THE EARL OF HALSBURY, L.C. – The importance of this case depends upon the true construction of ss. 81 and 82 of the Bills of Exchange Act, 1882. I think that there are more reasons than one for the opinion that I entertain, but the sections to which I refer are of such wide and general importance that I prefer to rest my judgment upon the true construction of those two sections.

I think it very important that everyone should know that people who take a cheque which is marked "not negotiable" and treat it as a negotiable security must recognise the fact that, if they do so, they take the risk of the person for whom they negotiate it having no title to it. In this case, it cannot be pretended that Huggins had any title to the cheque at all. I do not understand what additional security is supposed to be given to a cheque by putting the words "not negotiable" upon it, if the fact of it being negotiated can give a title to anyone. The supposed distinction between the title to the cheque itself and the title to the money obtained by it seems to me to be absolutely illusory. The language of the statute, which seems to be clear enough, would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money. Section 82, which contemplates the receipt of such a cheque in the ordinary course of business for a customer of bank, seems to me to contemplate a totally different class of transaction from that which is disclosed in this case. The bank thought proper to take this cheque as representing its face value, and if the

holder of it had no title, as he certainly had not, there is nothing in s. 82 which will entitle them to treat it as a receiving payment for a customer. It is not true to say that the banker is here sought to be made liable by reason of his having received payment for a customer. I do not think that Huggins was a customer of the bank at all within the meaning of the section; but what the bank are really insisting upon here is the valid negotiability of a cheque, fraudulently obtained, which, by the form of it comes within the provision in s. 81 that the person taking such a cheque shall not have a better title to the cheque than that which the person from whom he took it had. The bank insists, nevertheless, that Huggins gave a title to them, which enables them to sue. As I have said, I do not think that Huggins was a customer at all. I do not think that the transaction was a banking transaction, and although I think that there is another and a distinct ground which would defeat the bank's claim, I am content to rest my judgment upon the true construction of the statute. I, therefore, move your Lordships that the decision of the Court of Appeal be reversed, and that judgment be entered for the appellants with costs.

LORD DAVEY – The first point raised by the learned counsel for the respondents was that Huggins, in the circumstances which are stated in the case, had a property in the cheque which was indeed voidable by the appellants, who had been defrauded, but that the money having been received by the respondents in good faith and without notice of the fraud before the appellants had disaffirmed the transaction, it could not be recovered back from them, the respondents. I am of opinion that Huggins never had any property in the cheque, which was handed to him only as the collector and agent of the overseers in payment of a debt alleged to be due to them. The appellants never intended to vest any property in him for his own benefit, but the property in the cheque was intended to be passed to his employers the overseers, notwithstanding that it was made payable to Huggin's order. Huggins, therefore, had no real title to the cheque, and, it being marked "not negotiable", the respondents never acquired title to it as against the appellants. BIGHAM, J., however, and the Court of Appeal decided in favour of the respondents on the ground that Huggins was a customer of the respondents, and that they received the cheque for collection on his behalf within the meaning of s. 82 of the Bills of Exchange Act. The facts upon which they came to that conclusion are that Huggins had for about twenty years been in the habit of cashing cheques received by him as collector of rates at the respondents' bank. His employers, the overseers, kept their account at another bank at Newbury, and it was prima facie his duty to pay cheques received by him for rates into their banking account. It does not appear whether Huggins cashed cheques at the respondents' bank in any cases, except those in which he had to make payments out of the rate collected as poor rate to the credit of the waywarden, or rural district council, who kept their accounts with the respondents. In all the instances which were put in evidence from the books of the respondents the transaction was similar to the one in question namely, a payment to the credit of a customer of the respondents by means of a large cheque out of which Huggins received the change. He was asked the question in cross-examination whether he ever cashed cheques with the respondents, except when he had to make a payment out of the rate to the credit of one of their customers. Unfortunately, a discussion arose and the question was never answered. It is not shown that he did so, and I doubt whether he ever did.

But, be this as it may, I do not think that the relation of customer and banker was ever established between him and the respondents. It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that there must be some sort of account – either a deposit or a current account – or some similar relation to make a man a customer of a banker. On the facts proved in this case I do not think that the respondents undertook any duty towards Huggins. They took the cheque, which he offered in payment of a sum to be placed to the credit of their customers, and gave him the change, or in some cases (though it is not proved) they may have bought his cheque, possibly for their own convenience in remitting to the head office. But this will not, in my opinion, prove that Huggins was a customer, or that they undertook to collect the cheques on his behalf, so as to bring them within the protection of s. 82. I, therefore, agree that the appeal should be allowed.

* * * * *

Bapulal Premchand v. *Nath Bank Ltd.*

AIR 1946 Bom. 482

M.C. CHAGLA, J. – The plaintiff as the true owner of a cheque for Rs. 4000 has filed this suit against the defendant bank for conversion of the said cheque and claiming Rs. 4000. The material facts are really not a dispute. On 5th February 1945, Messrs. Ramchandra Ramgopal, a firm of merchants at Akola, drew a cheque upon the Laxmi Bank, Limited, for the sum of Rs. 4000 payable to the plaintiff or bearer. The cheque was crossed generally by Messrs. Ramchandra Ramgopal before delivery to the plaintiff. On the same day, the plaintiff dispatched this cheque by post from Akola to his commission agents Messrs. Chimanlal Mohanlal Suratvala for presentment and collection. This cheque never reached M/s Chiman Lal Mohan Lal Suratvala and apparently it was stolen during transit. On 25th February 1945, the defendant bank opened a branch in Bombay and on 26th February 1945 and Nemchand Amichand Gandhi an account by paying to the credit of his account Rs. 300 in cash. Although the name of the depositor was Gandhi, he signed his application form as "N.A. Gandhi". On 29th January 1945, Gandhi withdrew from his account by a cheque written in Gujarati the sum of Rs. 225. On 7th February 1945, Gandhi drew a further sum of Rs. 50 by drawing another cheque this time in English. Therefore the position was that on 7th February 1945, there was only a sum of Rs. 25 to the credit of Gandhi's Account. On 7th February 1945, Gandhi paid in into his account the cheque for Rs. 4000, which had been drawn in favour of the plaintiff and of which the plaintiff claims to be the true owner. This cheque was collected by the defendant bank and the amount credited to Gandhi's account. On 8th February 1945, Gandhi drew a cheque for Rs. 3800 on his account. The cheque was drawn in favour of Kantilal Maganlal Shah or bearer and has been endorsed by R.H. Desai. Bapulal Premchand, the plaintiff, has given evidence and also Chimanlal Nagindas Suratvala bearing out the facts as to the cheque being given to the plaintiff by the firm of Ramchandra Ramgopal and the cheque being stolen while in transit. On this evidence there can be no doubt and it has not been disputed by Mr. Taraporewalla that the plaintiff is the true owner of the cheque; nor can there be any doubt that Gandhi who paid in this cheque to the credit of his account had no title to this cheque.

2. It is, therefore, clear that as against the true owner the defendant bank is guilty of conversion. Under the ordinary law the bank would have no answer to the plaintiff's claim. But S. 131, Negotiable Instruments Act, 1881, affords the defendant bank a statutory protection against the true owner in cases of conversion provided certain conditions mentioned in that section are complied with. If a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself he shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment. In order, therefore, to escape the liability which the general law imposes upon a person or a party who converts the goods belonging to the true owner thereof, the banker must discharge the burden of establishing that he received payment on behalf of a customer of his of a cheque not belonging to the customer but to someone else in good faith and without negligence. In this case it is not suggested that the bank acted without good faith, but the plaintiff's allegation is that the bank acted with

negligence in collecting cheque and thereby has lost the protection afforded to a bank by S. 131, Negotiable Instruments Act, and the short point that I have to determine in this case is whether on the facts established the defendants have discharged their burden of proving that they acted without negligence. Now negligence is essentially a question of fact and it must depend upon the circumstances of each case whether negligence has been proved or not. It is difficult to define "negligence"

6. Therefore what I have to determine in this case is whether in collecting the cheque belonging to customer Gandhi the bank acted without reasonable care in reference to the interest of the plaintiff, the true owner of the cheque. The Privy Council in ***Commissioners of Taxation* v. *English, Scottish and Australian Bank Ltd***.[(1920) A.C. 683] laid down the principle which ought to guide the Courts in considering the question whether a bank is guilty of conversion in having been negligent in collecting a cheque on behalf of a customer which in fact did not belong to him. In that case one A. Friend of Sydney, put a cheque drawn by himself on the Australian Bank of Commerce for £786-18-3 into an envelope, along with some other cheques drawn by other members of his family, and addressed the envelope to the Commissioner of Taxation, George Street North, Sydney. This cheque was in payment of an assessment for income-tax. It was crossed with the word "Bank", that is to say, generally not especially. This cheque was stolen by some person unknown and was never cashed by the Commissioners of Taxation. On the following day, a man who gave his name as Stewart Thallon entered the head office of the respondents' bank at Sydney and stated that he wished to open an account. The accountant took his name and address, which this man gave, at certain well-known residential chambers in Sydney. He then handled in a sum of £20. The Accountant filled up the "paid-in" slip and the account was duly opened and a cheque-book issued to Thallon. On the following day the stolen cheque was handed in by Thallon; and on the next day Thallon withdrew three sums of £483-16-6, £266-10-0 and £50-12-6 by cheque drawn by himself. Thallon was never seen again and it was found that no person of that name lived at the address he had given. The Commissioner of Taxation then filed an action from which the appeal went to the Privy Council against the bank for conversion of the cheuqe. The Supreme Court for New South Wales held that the bank was not guilty of negligence. In discussing the question of negligence, their Lordships of the Privy Council are at pains to point out that the negligence with which the Court was concerned was not in opening the account but "in collecting the cheque" though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting the cheque, and the test of negligence which their Lordships adopted was whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make inquiry. Their Lordships emphasized that negligence was a question of fact and they rejected the argument of the learned Chief Justice of the Supreme Court that the care that the bankers should take should not be less than a man invited to purchase or cash such a cheque for himself might reasonably be expected to take. Their Lordships thought that was an inapposite standard for the simple reason that it was no part of the business or ordinary practice of individuals to cash cheque which were offered to them, whereas it was part of the ordinary business or practice of a bank to collect cheques for their customers. The argument that was presented to the Board was that the bank was negligent in

collecting the cheque for a customer who was of recent introduction and about whom the bank knew nothing. Their Lordships then pointed out that there was nothing suspicious about the way the account was opened; they were of the opinion that there was nothing suspicious in the fact that a cheque was paid into that account for collection one day after the account had been opened; they further pointed out that if it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque, it would render making business as ordinarily carried on impossible; customers would often be left for long periods without available money. But their Lordships do say that if the cheque had been for some unusually large sum, perhaps suspicion might have been aroused; but whether the cheque is or is not for an unusually large sum is really a question of degree. Their Lordships finally point out that in the cheque presented by Thallon there was no note of alarm or of warning which could have aroused the suspicion of the bank. Under the circumstances, their Lordships dismissed the appeal and held that the bank was not negligent. I have taken pains to reproduce at some length the reasons of the Privy Council in coming to the conclusion they did because both the decision and the observations of their Lordships are of considerable assistance in deciding the case before me and also of applying the test which the Privy Council did in the case before them.

7. The first contention of the plaintiff is that no individual of the name of Gandhi in fact existed and that the identity of Gandhi has not been established by evidence in this case. I accept Modi's testimony that he did know Gandhi as a broker before Gandhi came to him for the purpose of opening an account on 26th January 1945. I have also got the evidence of Gupte, the accountant of the defendant bank, on this point, Gupte says that when the cheque for Rs. 225 came to him in the ordinary course, he noticed that although the name of the drawer was Gandhi, he was signing as "Gandi" and he therefore sent for Gandhi and inquired of him about this. This man who said he was Gandhi told Gupte that he did this because his signature should not be forged. The next question I have got to consider is whether Modi was negligent in recommending Gandhi to the defendant bank as a customer. It is true that even asking Modi's evidence at its best. Modi had a rather casual acquaintance with Gandhi. But it is difficult for me to see why Modi did anything wrong in giving a reference if Gandhi went to him with actual cash and wanted to open an account in the bank after he had met Gandhi before at the *pedhi* of his friend Dave and had known him as a broker. Assuming that Modi was negligent in introducing Gandhi to the defendant bank, the next question is whether the negligence of Modi can be imputed to the bank. Now it is not suggested on the record as it stands that it was any part of the duty of Modi and the cashier to introduce customers. It is true that Modi has said that before he was employed he told the Manager that he would be able to introduce a few customers. That perhaps improved his chance of his being taken on as a cashier, but that does not mean that it was incumbent upon him in the performance of his duties to introduce customers. Modi gave a reference for Gandhi to the bank just as any other outsider would have done. The reference was not given in the performance of his duties as a cashier and therefore the negligence, if any, of Modi cannot be imputed to the bank. In order that the plaintiff should succeed, he must establish that the bank was negligent in accepting Gandhi as a customer if such negligence is sufficient to disentitle the defendant bank from the protection given to it under S. 131, Negotiable Instruments Act.

8. It is next urged by the plaintiff that the bank was negligent in accepting Gandhi as a customer. On this point the practice as to accepting customers is deposed to by Gangooli, the manager: of the defendant bank, and he says that the bank opened accounts only of such persons as were known to any member of its staff or to any outsider who was known to the bank. Gangooli further says that when a customer was introduced by a person other than a member of the staff, the bank made no reference to him about the customer either in writing or orally; but when a customer was introduced by the members of the staff, he always sent for that member of the staff and questioned him about the credentials of the customer. Gangooli also pointed out one of the rules of the bank, which was that the proposed customer should be properly introduced and his interpretation of the word "properly" was that it must be by one whom he could trust; and in the ordinary course he would trust every officer and servant in the bank if he introduced a customer. Gangooli, the manager, has further told me that when he saw the application form for opening the account of Gandhi and he saw that Gandhi was introduced by Modi he sent for Modi and asked him about Gandhi and Modi told Gangooli that he knew Gandhi well, that he was a broker and also knew that he had effected transaction with Dave. The manager stated that after he had this discussion with Modi he passed the form and initialled it in red ink. The manager further said that he followed the same practice with regard to the other customers introduced by Modi. On 26th January 1945, there were nine applications for opening new current accounts. Of these nine, three were introduced by Modi; three by the manager himself; and the remaining three by an outsider. In respect of all the three persons introduced by Modi the manager made personal inquiries of Modi, Mr. Tendolkar has commented on the fact that the manager did not tell Sub Inspector Paltonwalla about what Modi had told him about Gandhi before his application was sanctioned. In my opinion, that fact by itself is not sufficient to make me come to the conclusion that the manager's testimony on this point should be disbelieved. I accept the evidence of Gangooli, the manager of the defendant bank, that when he received the application form of Gandhi, he sent for Modi and made the inquiries to which he has deposed here.

9. In the next place, a great deal of emphasis was laid by the plaintiff on the fact that the address given by Gandhi, namely, 103, Kavarana Street, Fort, in his application form was a non-existent address. Now the position with regard to this address is that I have the evidence of Desai, Road Inspector, "A" Ward, Bombay Municipality, who has stated that the Municipality keeps a record of all the public streets and of such private streets as the public have access to; and no street, public or private, by the name of Kavarana Street appears in this record. But he admitted to Mr. Taraporewalla that the Post and Telegraph Office Directory did mention this street as being near the Bombay General Post Office. Sub-Inspector Paltonwalla also said that he could not find any such street as Kavarana Street in the Fort. But the Road Inspector of the Bombay Municipality did admit that there was a building known in Frere Road called Kavarana Building; next to this building there was a bye-lane off Frere Road; that bye-lane was not named; and the address of Kavarana Building was No. 103, Frere Road. There is no evidence before whether any man by the name of Gandhi was living in the Kavarana Building, the address of which is No. 103, Frere Road.

10. It is further contended that there were suspicious circumstances attendant upon the opening of the account by Gandhi. In the first place, it is pointed out that whereas the name of

the customer was Gandhi, he signed his application form and his specimen signature card as "Gandi." Gangooli, the manager, has stated that it was not uncommon for a man to give his specimen signature which was differently spelt for his own name; and as I have already pointed out, both Gupte and Modi have stated that in answer to inquiries by them Gandhi told them that he signed his name differently from the way in which it was spelt in order that his signature should not be copied. Then it is pointed out that it is very unusual for Modi, the cashier of the bank, to have filled in on behalf of Gandhi the paying in slip in respect of the deposit of Rs. 200 and also the application form for opening an account with the bank. It is true that the manager says that it is not customary for the cashier to do these things; but Modi has stated in the witness box that he did this because Gandhi did not know English and he did it as a friendly act. Modi also said that he filled in the application forms of other customers besides Gandhi whom he had introduced. The important fact to remember in connexion with the opening of Gandhi's account is that the account was opened with cash and not with any cheque paid in by Gandhi. When a customer opens an account with a cheque, certain inquiries may become necessary as to the cheque; but when an account is opened with cash, obviously the position is very different. I am stressing this point because when I come to deal with the authorities cited at the bar, its importance and relevance will become clear.

11. It is further urged that the bank's suspicions should have been aroused before they collected the cheque from Gandhi by the manner in which Gandhi's account was operated. A great deal of emphasis was placed on the fact that by 7th February 1945, the credit to Gandhi's account only stood at Rs. 25 and that on that very day a cheque for Rs. 4000 was paid in. Now the rules relating to current accounts of the bank provide that accounts should be opened with a minimum sum of Rs. 500; but as far as the Bombay branch was concerned, the evidence is borne out by the subsequent amendment of the rule itself that the managing director had given his sanction to opening accounts in Bombay with a minimum sum of Rs. 300 and in Bombay the minimum balance required to be maintained was Rs. 50. If the balance of Rs. 50 is not maintained, then a fee of Re. 1 is charged to the customer. The manager stated that it was not unusual for a customer to deposit the minimum amount necessary and then to withdraw within four or five days the maximum amount permissible and leave just the balance required. It is true that Gupte, the accountant in the defendant bank, did not quite agree with this view of the manager because he said that he knew of two or three cases where a customer had opened an account with the minimum deposit required and withdrawn practically the whole of the amount within a few days. He would consider such a thing as unusual. But Gupte went on to say that he did not think that that circumstance would put the bank on inquiry. It is difficult to see why a customer who opens an account with the minimum permissible, namely, Rs. 300 should not operate upon it so as to reduce it to an amount less than required under the rules to maintain the account and when he finds that he has gone below the minimum necessary, pay in a sum of Rs. 4000 so that the balance goes up to a much larger sum than required. It cannot be suggested that the payment of a cheque for Rs. 4000 was for such a large sum or such a disproportionate sum that it should have aroused the suspicion of the bank. Gupte, the accountant, has stated in his evidence that in the course of one day sums aggregating to rupees four lakhs are paid into the bank. If one were to look at the proportion between the original deposit, namely Rs. 300, and the payment of Rs. 4000, it is less striking than the proportion between the £ 20 deposited by Thallon in

the Privy Council case and the deposit on the subsequent day of a cheque for £ 786. The Privy Council there did not think that the cheque for £ 786 was for an unusually large sum. There is less reason to think here that the paying in of a cheque for Rs. 4000 by Gandhi was of so unusually a large sum that the suspicion of the bank should have been aroused. A further point was sought to be made that cheques were drawn by Gandhi in Gujarati and in English; but Gupte, the accountant, produced two cheques of another customer, one written in Gujarati and the other in English. Thus there is nothing in this fact by itself, which was sufficient to put the bank on inquiry with regard to its customers.

12. Having considered the various contentions of the plaintiff and having reviewed the evidence on the various points, I should now like to consider, in view of the authorities, what is the true and correct approach to the facts of this case. Primarily, inquiry as to negligence must be directed in order to find out whether there is negligence in collecting the cheque and not in opening the account. If there was anything suspicious about the cheque of Rs. 4000 which Gandhi paid in to the credit of his account, there can be no doubt that it would have been the duty of the bank to make the necessary inquiries before they cashed the cheque. To use the language of the Privy Council, if there had been any note of warning or alarm on the cheque itself, then if the bank had collected it disregarding the note of warning or alarm it would have done so at its own peril. But in this case the cheque is a perfectly innocuous document. It is made out in the name of the plaintiff or bearer and, as I have said, it is generally crossed and it is drawn by two partners of the firm of Ramchandra Ramgopal; and it is not seriously disputed by Mr. Tendolkar that there is nothing on the face of the cheque which should put the bank on inquiry. Therefore, *prima facie*, the bank was not negligent in collecting this cheque, which on the face of it did not in any way arouse its suspicion. But it is not sufficient that the cheque itself should not arouse the suspicion of the bank. If there is any antecedent or present circumstance, again to use the language of the Privy Council, which aroused the suspicion of the bank, then it would be the duty of the bank before it collected the cheque to make the necessary inquiry and undoubtedly one of the antecedent circumstance would be the opening of the account. Now it is important to bear in mind that there is no connection whatever in this case between the opening of the account and the stealing of the cheque. The cheque did not come into existence till 5th February 1945, and the account was opened on 26th January 1945. It is impossible to believe that Gandhi or whoever opened the account on 26th January had the remotest idea that on 5th February Messrs. Ramchandra Ramgopal would make out a cheque in favour of the plaintiff on 5th February and that the plaintiff would post it to his commission agent Suratvala and he would get an opportunity to steal the cheque and get his bank to collect it. But apart from there being no connection whatever between the stealing of the cheque and the opening of the account, was there any suspicious circumstance at all about the opening of the account? As I have pointed out, the account was opened with cash. There was a reference by the cashier and that reference was sufficient according to the practice followed by the bank. The manager made the necessary inquiries and the account was opened. But what Mr. Tendolkar contends for is that it is the duty of the bank to make inquiries about the respectability of an intended customer in every case although there may not be the least suspicious circumstance attendant upon the opening of the account and, according to Mr. Tendolkar, proper and sufficient

inquiries were not made in this case by the bank about the respectability or the integrity of Gandhi, their customer.

13. In the Privy Council case, ***Commissioners of Taxation* v. *English, Scottish and Australian Bank Ltd.***, curiously enough the case was cited at the bar by Mr. Romer K.C. on behalf of the appellants not on the question of negligence but on the question of what is sufficient to constitute a person a customer of the bank, and in the judgment of their Lordships this case is not referred to at all; and when one turns to the facts of the Privy Council case, which I have already set out in some detail above, it will be remembered that Thallon, the customer of the bank in that case, was given no reference. The bank knew nothing about him and yet the Privy Council, far from imposing upon the bank any necessity for making an inquiry about this customer, held that the bank was not negligent because there was nothing suspicious about the way the account was opened. It is true that in ***Ladbroke & Co.* v. *Todd,*** at least in the judgment as reported in (1914) 111 L.T. 43, Bailhache J. does say that there was nothing suspicious in the opening of the account by Jobson and yet he took the view that it was incumbent upon the bank to make the inquiries about the respectability of the customer. In view of the Privy Council decision, it is difficult for me to hold that the principle of law enunciated in (1914) 111 L.T. 43, is the correct law. According to the Privy Council, as I read the judgment, if a customer opens an account with cash and there is nothing suspicious about the manner in which the account is opened, the fact that the bank made no inquiries about the customer would not disentitle the bank to the protection given to it by S. 131, Negotiable Instruments Act. Of course on the facts before me there was actually a reference given by Modi to Gandhi and I have also held that the manager of the defendant bank did make inquiries about the position and status of Gandhi.

24. In my opinion, there is no absolute and unqualified obligation on a bank to make inquiries about a proposed customer. I agree that modern banking practice requires that a customer should be properly introduced or, in other words, that the bank should act on the reference of some one whom it could trust. Therefore, perhaps in most cases it would be wiser and more prudent for a bank not to accept a customer without some reference. But I am not prepared to go so far as to suggest that after a bank has been given a proper reference with regard to a proposed customer and although there are no suspicious circumstances attendant upon the opening of the account, it is still incumbent upon the bank to make further inquiries with regard to the customer. In this case, of course, as I have already pointed out, the manager of the defendant bank accepted the reference of the cashier Modi and also in fact made certain inquiries of Modi as to the position and status of Gandhi. In my opinion, it was not obligatory upon the defendant bank to make any further inquiries about this customer, and in having failed to make any such further inquiries, in my judgment; they are not guilty of negligence.

25. It is further urged that it is the duty of a bank to notice the account of a customer from time to time and in failing to notice the account the bank is guilty of negligence. Reliance is placed on an observation of Sankey L.J. in (1929) 1 K.B. 40 for this proposition. This is what the learned Lord Justice says (p. 70):

> 26. "….and there may be negligence in not noticing the account of the customer from time to time and considering whether it is a proper or a suspicious one."

27. Again the language used suggests that it is not obligatory, but in certain cases it may become necessary. But even for this limited proposition, Sankey L.J. relies on ***Morison* v. *London County and Westminster Bank Ltd***. Lord Chief Justice, to warrant the proposition laid down by Sankey L.J. In ***Crumplin* v. *London Joint Stock Bank Ltd***, Pickford J. observed that if the account had been opened with a very small sum to credit or with a sum that was very soon drawn down practically to nothing, and then large sums were paid in by cheques in quick succession, he would have no hesitation in coming to the conclusion that fact ought to have put the banker upon inquiry and he ought to have seen that the matter was right. But in this particular case the learned Judge came to the conclusion that as the cheques paid in were for comparatively small amounts and the cheques were paid at long intervals, there was no negligence on the part of the bankers to make any inquiry. It is true that in the case before me the account was opened with a very small sum and had been brought down practically to nothing. But I have noted the case where after that large sums had been brought in by cheques in quick succession. All that happened was that when the account was reduced to Rs. 25, a cheque for Rs. 4000 was paid in. In my opinion that was not sufficient to put the bank on inquiry and the bank was not negligent in not having made any inquiries when they discovered the state of account on 7th February 1945. Under all the circumstances of the case, the bank has established that there was no negligence on its part in collecting the cheque of Gandhi and crediting it to his account and, therefore, the bank is protected by S. 131, N.I.Act, and is not liable to the plaintiff for conversion.

28. I should like to mention one further contention on which an issue has been raised and which has been very rightly not pressed by Mr. Taraporewalla and that is the issue of contributory negligence. In their written statement, the defendants have alleged that the plaintiff was guilty of contributory negligence. It is difficult to see how a person who converts an article belonging to the true owner can turn upon the true owner and say: "I am not guilty of conversion because you showed negligence in relation to your own article." However negligent the true owner may be, it can be no answer by the person who converts the article that he should be let off from his liability because of the negligence of the true owner. But for the protection afforded to the bank by S. 131, N.I. Act, the bank would have no defence whatever to the claim of the plaintiff. Suit dismissed with costs.

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Indian Overseas Bank v. *Industrial Chain Concern*

(1990) 1 SCC 484

K.N. SAIKIA, J. - 2. The respondent - Industrial Chain Concern as plaintiff filed Original Suit in the City Civil Court, Madras for recovery of Rs 26,383.49 together with interest and costs, being the total amount of loss sustained by it on account of the alleged negligence and conversion on the part of the defendant - Indian Overseas Bank having its central office at 151, Mount Road, Madras-2, hereinafter referred as 'the Bank', by negligently allowing one Sethuraman, Manager of the plaintiff firm at Madras, to open a 'fictitious account' in the name of 'Industrial Chain Concern' as its proprietor and helping him to pay in stolen drafts and cheques drawn in favour of the plaintiff and collecting the same and paying to Sethuraman the proceeds thereof and closing the account thereafter. It was the case of the plaintiff that it was doing extensive business in Steel Roller Chains and Sprockets with leading industries and government undertakings. Its head office was situate at 36, Linghi Chetti Street, Madras-1. It had supplied goods to seven parties who sent to it drafts and cheques in its name amounting to Rs 26,383.49 and those drafts and cheques had been received by Sethuraman, its Manager, who after opening the 'fictitious account' in the Bank's Nungambakkam Branch paid in the stolen drafts and cheques and the Bank collected those and allowed Sethuraman to withdraw the same defrauding the plaintiff. The plaintiff averred that the Bank was negligent and guilty of conversion in opening of the account, collection of the cheques and drafts and allowing Sethuraman to withdraw the same and therefore, it was liable to make good the plaintiff's loss.

3. The appellant Bank as defendant resisted the suit contending, inter alia, that it was not negligent in allowing Sethuraman to open the account inasmuch as approaching the Bank Sethuraman represented that he, as proprietor, had started a firm under the name and style of "Industrial Chain Concern" and proposed to open an account in that name. Since the Manager of the Bank at Nungambakkam Branch was erstwhile classmate of Sethuraman he (the Manager) knew him and gave the introduction relying on which the current account was opened and after opening the account, which was a real account and not a 'fictitious account' as alleged, various cheques and drafts had been paid into the account by the customer for collection and the Bank in good faith and without negligence, in course of its business, collected them and credited the account and Sethuraman as customer withdrew money from his account, and that neither at the time of opening the account nor at the time of paying in and collection of the cheques, nor at the time of allowing money to be withdrawn there was anything to arouse any suspicion regarding the bona fides of the representation made by Sethuraman. Later on the customer having expressed a desire to close the account because, as he said, he was winding up his business, the account was closed. There was, therefore, no negligence on the part of the Bank acting in good faith and it was not liable for conversion.

5. Mr. C. Seetharamiah, the learned counsel for the appellant submits, inter alia, that the finding of the courts below that the defendant Bank was negligent in opening the account is contrary to law inasmuch as there were no circumstances antecedent or present to arouse any suspicion and there was no obligation on the part of the Bank to compare and verify the name and address given by Sethuraman as proprietor, Industrial Chain Concern with the address of

the then existing plaintiff's firm of the same name; that the High Court's finding that the Bank was negligent in clearing the amounts of the cheques is equally contrary to law inasmuch as there was nothing ex facie to put the Bank on guard and there was no warning or indication of defective title on the face of the cheques and drafts to arouse suspicion of the Bank and it was not necessary for it to make thorough enquiry about the cheques and drafts to have been entitled to invoke the protection of Section 131 of the Negotiable Instruments Act; and that even assuming, but not admitting that the Bank was negligent, the plaintiff itself contributed to it by entrusting Sethuraman to receive the cheques and drafts and to deal with them for a long time and that even when the complaint was made to Deputy Commissioner of Police on February 19, 1975 it was about two cheques only, and there was still no complaint about other cheques and drafts.

6. The first question to be decided, therefore, is whether the Bank was negligent in opening the account in the name of Sethuraman, as proprietor, Industrial Chain Concern.

7. Evidence of DW 1 Muthukrishnan, Manager of the Bank at the relevant time is that the account was opened by Ex. B-1, the Account Opening Form, on October 3, 1974 by Sethuraman under the title Industrial Chain Concern, the sole proprietary concern. It was signed by Sethuraman for Industrial Chain Concern with a rubber stamp as proprietor. Muthukrishnan, DW 1 deposed:

> "This account was opened by R. Sethuraman under the title Industrial Chain Concern sole proprietary concern. Sethuraman is the sole proprietor. Before that date I knew Sethuraman. He was my collegemate in 1955-57 in Vivekananda College. I was meeting him in social gathering. When he went to open an account, he represented that he had just started as commission agent under the name and style of Industrial Chain Concern as sole proprietary concern. He wanted to open an account with overdraft facility. I declined his request for overdraft because he himself stated that he had just started commission business. I was able to identify him as the collegemate and to open his account I have signed the introduction in my personal capacity. ... It was an ordinary current deposit account. The introduction given by me was in the normal course of banking business. Before opening account, he showed me some business correspondence and orders. Some of the orders were placed by India Sugars and Refineries and Madras Fertilisers. At that time there was nothing to show that the Industrial Chain Concern was not a proprietary concern or that Sethuraman was an employee of the firm. He opened an account with cash deposit of Rs 100 as he described himself as a proprietary concern and as he just then started the business and as I did not grant loan facility there was no occasion for calling credit reports from other bankers. There was normal operation of the account. Cheques given in the name of the concern were deposited in the account and after realisation they were withdrawn."

Comparing the statement of account and Ex. B-1 with the above evidence there is nothing to doubt this witness. He denied that at any stage the Bank had acted with negligence or without good faith or that there was no proper introduction for opening an account. He clearly said that the address given in Ex. B-1 was Nallathambi Mudali Chetti Street and that he knew the location and it was far away from Nungambakkam. That was the place of business of

Sethuraman mentioned at the opening of an account and the Mount Road Branch of the defendant Bank was the nearest branch for that place. Opening of an account by Sethuraman with a trading place at Nallathambi Street with Nungambakkam Branch occurred to him as unusual but it did not create any suspicion as he asked Sethuraman why he wanted to open an account in Nugambakkam Branch and Sethuraman replied: "I am a commission agent. I want overdraft facility. Your are the only agent known to me and that is why I have come to Nungambakkam Branch." DW 1 also said that in opening the current account he glanced through the order and correspondence shown to him by Sethuraman regarding supplies but he did not check up the address given in the correspondence by these companies in the name of the Industrial Chain Concern. He denied that he had not checked up the business credentials for the account to be opened in the name of the business concern and that he was negligent in that aspect. He said: "I declined overdraft facility. That itself shows that I was not negligent. Once I declined overdraft facility it did not strike me to refer Sethuraman to the nearest branch from his trading place. I did not refer him to the Mount Road Branch. I suggested he can go to the Mount Road Branch. He came with another request that his overdraft application might be considered after the period of about one year, after his business had improved. Therefore, he wanted to open an account in Nungambakkam Branch." Both courts below held that the Bank acted in good faith. We agree. The question is whether the Bank could be held to have been negligent while opening the account.

8. It is, however, necessary to bear in mind that this question is often associated with the question of negligence in collecting cheques, etc. for the customers paid into the account. This is because till an account is opened no banker-customer relationship exists between the bank and the person proposing to open an account. Once the account is opened, that relationship is created and with it mutual rights and obligation between the banker and the customer are created under law. Opening an account by cash is a little different from opening an account by a cheque as in that case the Bank has to act according to the tenor of that instrument and its collection and payment involves the Bank's duty owed to its real owner if the proposer happens not to be its real owner. Even when an account is opened by depositing cash but so soon after the opening of the account any cheque is paid into it as to make it part of the same transaction with the opening, the same duty may be implied by law.

9. What is the standard of care to be taken by a bank in opening an account? In the ***Practice and Law of Banking*** by H.P. Sheldon, 11th edn., in chapter 5 at page 64 it is said:

> "Before opening an account for a customer who is not already known to him, a banker should make proper preliminary inquiries. In particular, he should obtain references from responsible persons with regard to the identity, integrity and reliability of the proposed customer.
>
> If a banker does not act prudently and in accordance with current banking practice when obtaining references concerning a proposed customer, he may later have cause for regret."

10. M.L. Tannan in ***Banking Law and Practice in India***, 18th edn. at page 198 says:

> "Before opening a new account, a banker should take certain precautions and must ascertain by inquiring from the person wishing to open the account, if such

person is unknown to the banker, as to his profession or trade as well as the nature of the account he proposes to open. By making necessary inquiries from the references furnished by the new customer, the banker can easily verify such information and judge whether or not the person wishing to open an account is a desirable customer. It is necessary for a bank to inquire, from responsible parties, given as references by the customer, as to the latter's integrity and respectability, an omission of which may result in serious consequences not only for the banker concerned, but also for other bankers and the general public."

11. One of the tests of deciding whether the bank was negligent, though not always conclusive, is to see whether the Rules or instructions of the banks were followed or not. We may accordingly consult those instructions. Ex. B-6 contains the general instructions regarding constituent accounts for bank. Mark II deals with opening of accounts. It says:

"Except at large branches where the sub-agent or accountant may be authorised to open Current Accounts, no new Current Account shall be opened without the authority of the agent manager who is solely responsible for all Current Accounts being opened in the proper manner. A written application on the appropriate form must be submitted and will be initialled by the agent at the top left corner after he has satisfied himself of the respectability of the applicant(s). It is important that every party must be introduced to the Bank by a respectable person known to the Bank, who must normally call at the Bank and sign in the column specially provided for the purpose in the account opening form. In all cases his signature must be verified with the specimen lodged and attested. The agent or accountant may introduce constituents to the Bank provided they are known to him personally and in such cases he should sign the application form at the appropriate place in his personal capacity. When the introduction of any other member of the staff is accepted, the agent must invariably make independent inquiry and record his findings on the account opening form for future reference if the need arises...."

12. Mark IV deals with accounts of proprietary concerns. It says:

"An individual trading in the name of concern should fill in Form F.S. 5 and sign it in his personal name and also affix his signature on behalf of the concern as proprietor in the space provided."

If the banker was negligent in following up the references given at opening of account and subsequently cheques etc. are collected for the customer paid into that account and those happened to be of someone else the Bank may be liable for conversion, unless protected by law. In the instant case, Sethuraman having been known to the Manager who gave the introduction, there was no violation of any instruction or rules.

14. In ***Ladbroke & Co.*** **v.** ***Todd***, the plaintiff drew a cheque and sent it to the payee by post. The letter was stolen and the thief took it to the defendant, a banker, and used it for the purpose of opening an account for the purpose of which he forged the payee's endorsement. The defendant accepted believing him to be the payee. He was not introduced to the bank and no references were obtained. The defendant opened the account and the cheque was specially cleared at the request of the thief, and he drew out the proceeds on the next day. On the

discovery of the fraud the plaintiff brought an action against the defendant for conversion. One of the main questions raised was whether the account having been opened by payment in all the cheques to be collected the defendant could be properly regarded as having received payment for a customer. It was held that as account was already opened when the cheque was collected, payment had been received for a customer. The drawer thereupon sent another cheque to the real payee and took an assignment of his rights in the stolen cheque and, as holders of the cheque or alternatively as assignees, brought an action against the bank to recover the proceeds collected by the bank as money had and received to their use. Evidence was given that it was the general practice of bankers to obtain a satisfactory introduction or reference. It was held that the banker had acted in good faith, but was guilty of negligence in not taking reasonable precautions to safeguard the interests of the true owner of the cheque and that therefore he had put himself outside the protection of Section 82 of the Bills of Exchange Act, 1882. Bailhache, J. also said that the banker would have been entitled to the protection of the section as having received payment for a customer, but had lost it owing to his want of due care. It was also held that the relation of banker and customer began as soon as the first cheque was handed in to the banker for collection, and not when it was paid.

16. In the instant case there was no question of a reference inasmuch as the Manager himself knew Sethuraman and gave the introduction. The account was not opened by depositing any cheque but by depositing cash of Rs 100. The first cheque was paid into the account later and there is nothing to show that it formed part of the same transaction. No particulars have been proved as to the tenor of that cheque. The Manager made several inquiries which in the facts and circumstances of the case, in our view, were sufficient, for it is an accepted rule that the banker may refrain from "making inquiries which it is improbable will lead to detection of the potential customer's purpose if he is dishonest and which are calculated to offend him and may drive away his customer if he is honest." Except when circumstances of a case so justifies, in making inquiries the banker's attitude may be solicitous and not detective. Sethuraman was believed when he said that he was the proprietor of Industrial Chain Concern which he recently started. He showed some orders and references in proof of his business. The banker believed in existence of his business but did not meticulously examine the addresses. Sethuraman was asked as to why he wanted to come to that branch and his reply was that he expected there to have overdraft facility and when that was refused he expressed that after his business improved he would expect to be granted overdraft facilities after one year. There is no doubt that Sethuraman was a rogue, but he prepared the plan intelligently and the banker in good faith believed in his statements. We, therefore, find it difficult to hold that the Bank was negligent in opening the account accepting the deposit of cash by a person known to the Manager of the Bank under the above circumstances.

17. Mr. Balakrishnan has argued that a cheque for Rs 2800 was paid in on the same date which was a stolen cheque and it ought to have aroused suspicion of the banker. But there is nothing to show that it formed part of the same transaction. As we have already observed, once an account is opened the relationship of banker and customer begins. Duration is not of the essence. As was held in ***Ladbroke & Co***. the mere opening of an account without the actual transaction was sufficient to constitute the relationship and this view was followed in

Commissioners of Taxation* v. *English, Scottish and Australian Bank and it was stated that the word 'customer' signifies a relationship of which duration is not of the essence. The contract is not between a *habitue* and a newcomer, but between a person for whom the bank performs a casual service ... and a person who has an account of his own at the bank. Lord Chorley has even expressed the view that for the purpose of establishing the relationship of banker and customer there appears to be no logic in the actual opening of the account, and when the banker agrees to accept the customer the relationship comes into existence at that time though the account may not be opened until later. According to the author "the relationship being contractual should be subjected to the normal rules of contract law and the making of the contract depends on the acceptance of the offer. This contract could clearly be effected before an account had actually been opened though it would state that there must be an agreement to open an account before the banker and customer relationship can exist." In the instant case there is, therefore, no doubt that the first cheque was subsequently paid in by Sethuraman as a customer and the Bank was to collect it on account of the customer. The Bank, therefore, in collecting the cheque and paying the proceed to Sethuraman acted as a Collecting Banker and can be held negligent, if at all, only as such as it was to collect it on account of the customer. In fact, from the statement of account it is clear that the account was opened on October 3, 1974 and was closed on February 1, 1975 and there were a number of transactions of deposits and withdrawals. The detailed particulars of the cheques paid into the account are not in evidence, it is, therefore, difficult to know whether each individual cheque or draft should have aroused suspicion in the mind of the banker before accepting the same for collection from its customer.

18. The High Court did not analyse the legal position and did not consider the facts and circumstances in this regard in proper perspective. We are not inclined to hold the Bank negligent in opening the account considered alone.

19. The next question is whether the Bank was negligent in collecting the cheques. In collecting a cheque on account of a customer the banker is protected by Section 131 of the Negotiable Instruments Act, 1881.

22. In the instant case in the absence of any evidence giving the details of the cheques and their tenor, we are unable to hold that there were notices and circumstances which ought to arouse suspicion on the part of the Bank. The Bank normally has an obligation to collect the customer's cheques paid into his account. In **Halsbury's *Laws of England,*** 4th edn., Vol. 3 at para 46 we read:

> "46. Customer's title to money paid in: In the absence of notice, express or implied the banker is not concerned to question the customer's title to money paid in by him, although if a person entrusted with a cheque wrongfully pays it to the bank to the credit of someone who is not entitled to it, the true owner, if he has given notice to the bank of his title while the credit remains, may recover the amount from the bank as money had and received; or as damages for conversion....
>
> A banker should be very cautious in accepting for a customer's account any cheque drawn by him as agent upon his principal's account, however broad may be the authority to draw. If the court detects circumstances which should arouse

suspicion that the agent was abusing his authority, the banker will be liable to the principal even though the cheque was crossed."

This is because in every case of opening an account bank takes a mandate and, until changed, controls the operation of the account. In the instant case, having already opened the account the Bank was not concerned to question the customer's title to money paid in by him, when a cheque was drawn in favour of Industrial Chain Concern.

23. In ***Capital and Counties Bank* v. *Gordon***, the House of Lords accepted the position that a bank acts basically as a mere agent or conduit pipe to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of its customer. Unless crossed the banker himself is the holder for value. He may be a sum collecting agent or he may take as holder for value or as holder in due course. As an agent of the customer for collection he is bound to exercise diligence in the presentation of he cheques for payment within reasonable time. If a banker fails to present a cheque within a reasonable time after it reaches him, he is liable to his customer for loss arising from the delay. A banker receiving instruments paid in for collection and credit to a customer's account may collect solely for a customer or for himself or both. Where he collects for the customer he will be liable in conversion if the customer has no title. However, if he collects in good faith and without negligence he may plead statutory protection under Section 131 of the Act.

24. In the instant case in the absence of evidence on record we find it difficult to ascertain whether the Bank was collecting the cheques merely as agent of the customer or as holder for value or as holder in due course. Some of the entries in the statement do show deposits and withdrawals of lesser amounts on the same date, but that is not enough for arriving at any conclusion whether the Bank was collecting as a holder for value and not merely as an agent of the customer.

25. To enable a bank to avail the immunity under Section 131 as a collecting banker he has to bring himself within the conditions formulated by the section. Otherwise he is left to his common law liability for conversion or for money had and received in case of the person from whom he took the cheques having no title or defective title. The conditions are:

(*a*) that the banker should act in good faith and without negligence in receiving a payment, that is, in the process of collection, (*b*) that the banker should receive payment for a customer on behalf of him and thus acting as a mere agent in collection of the cheque and not as an account holder (*c*) that the person for whom the banker acts must be his customer and (*d*) that the cheque should be one crossed generally or especially to himself. The receipt of payment contemplated by the section is one from the drawee bank. It is settled law that the onus of bringing himself within the section rests on the banker.

26. We have already observed that the principle enunciated in the ***Commissioners of Taxation* v. *English, Scottish and Australian Bank*** is that the opening of the account is material as shedding light on the question whether there was negligence in collecting a cheque does bring out the true position that there must be sufficient connection established between the opening of the account and the collection of the cheque before a defence under Section 131 could be held to be barred. The question would then be one of facts as to how far the two stages can be regarded as so intimately associated as to be considered as one

transaction. We have already found that in the instant case there was no evidence to show that the opening of the account and the collection of the cheques and drafts formed part of the same transaction. Where a banker in good faith and without negligence receives payment for a customer of a cheque and the customer has no title or a defective title to the cheque, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment. The banker is not to be treated for purposes of the protective section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, endorsement of the cheque or other instrument to which the section applies. This has to be so because the drawer of the cheque is not a customer of the bank while the payee is. Where the protection attaches, it covers the receipt of the cheque and every step taken in the ordinary course of business and intended to lead up to the receipt of payment. Even if there was negligence in opening of the account that act ipso facto would not result in loss to the true owner of the cheque collected. While collecting the cheque for a customer the bank is under obligation to present it promptly so as to avoid any loss due to change of position. When it receives the money collected then also there is no direct loss to the true owner. It is only when the amount is paid or withdrawn by the customer that the loss results. During this period what is important to note is that at every step in collection of the money and making payment the banker is bound by the banker-customer relationship and rights and obligations flowing therefrom. Even so, if there was anything to rouse suspicion regarding the cheque and ownership of the customer the banker may find itself beyond the protection of Section 131. The scope or ambit of possible suspicion will depend on various situations that may have prevailed between the drawer of the cheque and the customer. In the instant case Sethuraman having been believed to have been the proprietor of Industrial Chain Concern the cheques payable to Industrial Chain Concern left little scope to have aroused any suspicion in the minds of the Bank. The position may have been different if Sethuraman was known as acting as an employee of Industrial Chain Concern and the cheques were payable to that concern, but were deposited into personal account of the employee which was not the case here.

27. There can be no doubt that the existence of a current account created relationship of banker and customer in this case. Sethuraman would be a customer even if his account was overdrawn until that account was closed. In **Halsbury's *Laws of England***, 4th edn., Vol. 3 at para 103 it is said:

> "If the banker wishes to plead the statutory protection, his dealings throughout must be in good faith and without negligence. The alternative liability arising from negligence renders the question of good faith practically superfluous, and it is seldom, if ever, raised. Negligence in this connection is breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the interests of the true owner."

It is a settled law that the test of negligence for the purpose of Section 131 of the Act is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present is so out of the ordinary course that it ought to arouse doubts in the banker's mind and cause him to make inquiries. The banker is bound to make inquiries when there is anything to rouse suspicion that the cheque is being wrongfully dealt with in being

paid into the customer's account. However, the banker is not called upon to be abnormally suspicious. In the instant case no such regulation of the bank has been produced so as to establish that in collecting the cheque and allowing the customer to withdraw the bank violated its own regulations. Nor has the plaintiff been able to show that the transactions in paying in the drafts and cheques coupled with the circumstances antecedent and present were so out of the ordinary that it ought to arouse doubts in the banker's mind and cause him to make inquiries. As we have observed that the Bank's negligence in not making inquiries as to the customer upon opening an account if there was any, could shed light in its negligence in collecting the cheques for him. But we have found that there was no such negligence in this case. Mr. Balakrishnan's submission that in this case while opening the account, the appellant should have inquired of the plaintiff's firm does not reasonably follow in view of the fact that what Sethuraman said was that he was the proprietor of the newly established firm "Industrial Chain Concern" and if that was the name of the payee in the cheques, Sethuraman having been accepted as its proprietor there would be no room for suspicion that the firm's cheques were being paid into the proprietor's personal account. There is no allegation and proof that the collection and payment were made contrary to the tenors of the instruments. Carelessness could occur at the time of collection especially if there was failure to pay due attention to the actual terms of the mandate. The actual circumstances at the time of paying in for collection, if the amount was very large one might raise suspicion. But in this case the first cheque paid in was of 2800.17 which could not be regarded as such a large amount to have aroused suspicion considering the fact that the firm was 'Industrial Chain Concern', dealing in industrial chains and pulleys.

30. As a general rule a banker before accepting a customer, must take reasonable care to satisfy himself that the person in question is of good reputation; and if he fails to do so he will run the risk of forfeiting the protection given by Section 131 of the Act but 'reasonable care' will depend on the facts and circumstances of the case. The courts have tended to accept the practices and procedures which bankers lay down for themselves, but that can by no means be decisive. The "type of necessary inquiry at the opening of an account seems to be less stringent at present than it was a generation ago, and it is difficult to spell out from the cases any hard and fast rules". This is so because, in the words of Lord Chorley, the use of banking facilities at the present day "has become so widespread and has penetrated so far into social strata where banking accounts were previously unknown, that precautions at one time considered necessary are now difficult in the press of business to apply. One of the obvious problems is that of the dishonest employee who may wish to open a bank account for the purpose of getting cheques collected for which he has stolen from his employer. If the banker is aware of his employment he will naturally watch that those cheques of which the employer is payee, or in which he is otherwise interested, do not pass through the account. But how far can he be expected to keep himself informed of the employment of all his customers? This is typical of the problems which have faced the judges, and on which their views have tended to vary from time to time, and indeed from judge to judge."

33. It is thus clear that the question of negligence or no negligence depends entirely on the facts of each individual case and thus makes it difficult to judge in advance how any particular litigation involving allegations of negligence will go. In the instant case

Sethuraman had in effect opened another account in the name of the plaintiff firm and operated it himself as its proprietor.

34. As we have already observed carelessness on the part of the bank is most likely to occur at the time of collection of cheques especially in failure to pay due attention to the actual terms of the mandate. It is not here a case of playing the detective but of a careful examination of everything which appears on the front and back of the instrument. Each set of circumstances produces its own requirements. The instruments, crossing, type of crossing, per pro, pay cash or order etc. are important. The banker may be negligent in acting contrary to such mandates under appropriate circumstances. In the instant case, however, no details regarding such mandates on the alleged cheques are available.

35. The High Court took the view that if the Manager of the Bank gave the introduction of Sethuraman to open the account in the plaintiff's name showing him as its proprietor without making any enquiry as to its true relationship with the concern then he was taking a risk and when it transpired that Sethuraman had made fraudulent representation then the Manager should be taken to have acted negligently. We are not inclined to agree inasmuch as while dealing with a customer for collecting a cheque, there is no contractual relation between the collecting banker and the true owner. The duty is implied by law. A conduct beneficial to the customer at the expense of the true owner when the Bank acts in good faith and without negligence, is no breach of that duty. It is from this position of the true owner that question of negligence under Section 131 of the Act has to be viewed.

37. While arriving at the above conclusion we have borne in mind the standard of reasonable care and the banking practices and its trend in a developing banking system in the country. Any stricter liability may not be conducive. It will also be observed that expansion of the banker's liability and corresponding narrowing down of the banker's protection under the provision of Section 131 of the Act may make the banker's position so vulnerable as to be disadvantageous to the expansion of banking business under the ever-expanding banking system. This is because a commercial bank, as distinguished from a Central bank, has the following characteristics, namely (1) that they accept money from, and collect cheques for, their customers and place them to their credit; (2) that they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and (3) that they keep current accounts in their books in which the credits and debits are entered. The receipt of money by banker from or on account of his customer constitute it the debtor of the customer. The bank borrows the money and undertakes to repay it or any part of it at the branch of the bank where the account is kept during banking hours and upon payment being demanded. The banker has to discharge this obligation and normally the banker would not question the customer's title to the money paid in. Applying the above principles of law to the facts of the instant case we are not inclined to hold that the Bank was negligent either in collecting the cheques and drafts or allowing Sethuraman to withdraw the proceeds. In the result, this appeal succeeds.

* * * * *

Modi Cements Ltd. v. *Kuchil Kumar Nandi*

(1998) 3 SCC 249

S.P. KURDUKAR, J. - 3. The present proceedings arise out of a complaint filed by the appellant in the Court of Chief Judicial Magistrate, Calcutta under Section 138 of the Negotiable Instruments Act, 1881 against the respondent. The appellant-Company is a public limited company manufacturing and selling cement under the brand name "Modi Cement" throughout India.

4. The respondent/accused carries on business in the name and style of "Dubey Construction, M/s Nandi Traders, M/s Nandi Concerns, M/s Nandi and Co., M/s Nandi Enterprises, M/s S.K. Enterprises, M/s S.K. Trading and M/s Jupiter Art. The respondent/accused is sole proprietor of all these business concerns.

5. It is alleged by the appellant in the complaint that the respondent purchased from them non-levy Modi Cement on credit against the orders placed on behalf of his concerns. These orders were placed by the respondent with the Calcutta office of the appellant and it was agreed that the price of the consignments was to be paid by the respondent at the said office. After taking accounts it was found that on 23-2-1994 the respondent incurred a liability/debt of Rs 1,10,53,520.30 payable to the appellant towards the purchased price of the cement supplied by them to the respondent. In partial discharge of the said liability/debt the respondent drew three cheques in favour of the appellant on 23-2-1994, 26-2-1994 and 28-2-1994 bearing Cheques Nos. 1308340-42 for a sum of Rs 2,00,000 each.

6. The appellant presented these three cheques on 9-8-1994 for encashment through their bankers, Bank of India, J.L. Nehru Road Branch, Calcutta. On 6-9-1994 the Indian Bank, Bankura, the banker of the respondent returned the said cheques as unpaid with an endorsement "payment stopped by the drawer". Later on it transpired that vide his letter dated 8-8-1994 the respondent had given such instruction. The appellant on 13-9-1994 sent a legal notice in terms of Section 138 of the Act to the respondent demanding payment of the aforesaid amounts under the cheques. The said notice was duly served on the respondent on 17-9-1994. Since the respondent failed and neglected to make the payment of the amount of the aforesaid three cheques within the stipulated period of 15 days which expired on 2-10-1994, the appellant filed three criminal complaints against the respondent under Section 138 of the Act. After entering appearance in obedience to the processes issued in connection with the above three cases the respondent filed applications for staying the proceedings which were rejected.

7. The respondent then filed three petitions under Section 482 CrPC in the High Court of Calcutta for quashing the complaints. The learned Single Judge vide his common judgment and order dated 21-11-1996 allowed the petitions of the respondent and quashed the complaints. It is against this order passed by the High Court the appellant has filed these appeals.

8. Briefly stated the reasons given by the High Court are as under:

(*i*) The appellant has not pleaded in his complaint that the cheques were returned by the bank unpaid "either because the amount of money standing to the credit of

that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank". The necessary ingredients of Section 138 of the Act having not been pleaded the Court could not have taken cognizance of the offence.

(*ii*) Mere endorsement of the bank "payment stopped" was not sufficient to entertain the complaint as that was not an ingredient of the offence under Section 138 of the Act.

9. The High Court has laid much stress in its judgment to emphasize that a petition under Section 482 CrPC is tenable when no offence even prima facie was made out in the complaint. There can be no dispute regarding that legal proposition but the application thereof will depend upon the averments made in the complaint. But the second reasoning of the High Court is contrary to the decision of this Court in ***Electronics Trade & Technology Development Corpn. Ltd.*** **v.** ***Indian Technologists & Engineers (Electronics) (P) Ltd.*** [(1996) 2 SCC 739]. While interpreting Section 138 of the Act, it firstly observed as under:

"*5*. It would thus be clear that when a cheque is drawn by a person on an account maintained by him with the banker for payment of any amount of money to another person out of the account for the discharge of the debt in whole or in part or other liability is returned by the bank with the endorsement like (*1*) in this case, 'refer to the drawer' (*2*) 'instructions for stoppage of payment' and stamped (*3*) 'exceeds arrangement', it amounts to dishonour within the meaning of Section 138 of the Act. On issuance of the notice by the payee or the holder in due course after dishonour, to the drawer demanding payment within 15 days from the date of the receipt of such a notice, if he does not pay the same, the statutory presumption of dishonest intention, subject to any other liability, stands satisfied."

10. It then took up for consideration a similar contention advanced before them by the learned counsel for the drawer of the cheques that stoppage of payment due to instructions does not amount to an offence under Section 138 of the Act and repelling the same observed:

"We find no force in the contention. The object of bringing Section 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments."

The Court further observed:

"It is seen that once the cheque has been drawn and issued to the payee and the payee has presented the cheque and thereafter, if any instructions are issued to the bank for non-payment and the cheque is returned to the payee with such an endorsement, it amounts to dishonour of cheque and it comes within the meaning of Section 138."

11. Another two-Judge Bench while dealing with the same question in ***K.K. Sidharthan*** **v.** ***T.P. Praveena Chandran*** [(1996) 6 SCC 369]:

"This shows that Section 138 gets attracted in terms if cheque is dishonoured because of insufficient funds or where the amount exceeds the arrangement made with the bank. It has, however, been held by a Bench of this Court in ***Electronics Trade and Technology Development Corpn. Ltd. v. Indian Technologists and***

Engineers (Electronics) (P) Ltd. that even if a cheque is dishonoured because of 'stop payment' instruction to the bank, Section 138 would get attracted."

We are in complete agreement with the above legal proposition.

12. The learned counsel for the appellant vehemently urged that both these decisions of this Court clearly support the case of the appellant and the trial court had rightly issued the process and the High Court was totally wrong in taking a contrary view.

13. It was, however contended on behalf of the respondent that the decision in ***Electronics Trade & Technology Development Corpn. Ltd***. does not support the appellant as far as the facts that emerged in the present cases inasmuch as the drawer had intimated to the bank on 8-8-1984 to stop the payment whereas the cheques were presented for encashment on 9-8-1994 although the same were drawn on 23-2-1994, 26-2-1994 and 28-2-1994. The learned counsel for the respondent strongly relied upon the following observations in ***Electronics Trade & Technology Development Corpn. Ltd***:

> "Suppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted."

14. The learned counsel for the appellant submitted that if the attention of the Court was drawn to the provisions of Section 139 of the Act which according to him, had an important bearing on the point in issue, the Court would certainly not have made the above observations.

15. According to the learned counsel if the observations of this Court in ***Electronics Trade & Technology Development Corpn. Ltd.*** to the effect,

> "[S]uppose after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted"

is accepted as good law, the very object of introducing Section 138 in the Act would be defeated.

16. We see great force in the above submission because once the cheque is issued by the drawer a presumption under Section 139 must follow and merely because the drawer issues a notice to the drawee or to the bank for stoppage of the payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of a cheque in due course. The object of Chapter XVII, which is entitled as "OF PENALTIES IN CASE OF DISHONOUR OF CERTAIN CHEQUES FOR INSUFFICIENCY OF FUNDS IN THE ACCOUNTS" and contains Sections 138 to 142, is to promote the efficacy of banking operations and to ensure credibility in transacting business through cheques. It is for this reason we are of the considered view that the observations of this Court in ***Electronics Trade & Technology Development Corpn. Ltd.*** in para 6 to the effect "Suppose after the cheque is issued to the

payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course presents the cheque to the bank for payment and when it is returned on instructions, Section 138 does not get attracted", does not fit in with the object and purpose for which the above chapter has been brought on the statute-book.

17. The above view has been referred to in ***K.K. Sidharthan*** as is clear from paras 5 and 6 of the judgment. Paras 5 and 6 read as under:

> "*5*. The above apart, though in the aforesaid case this Court held that even 'stop payment' instruction would attract the mischief of Section 138, it has been observed in para 6, that if 'after the cheque is issued to the payee or to the holder in due course and before it is presented for encashment, notice is issued to him not to present the same for encashment and yet the payee or holder in due course present the cheque to the bank for payment and when it is returned on instruction, Section 138 does not get attracted'.
>
> *6. From the facts mentioned above, we are satisfied that in the present case cheques were presented after the appellant had directed its bank to 'stop payment'*. We have said so because though it has been averred in the complaint that the cheque dated 10-10-1994 was presented for collection on that date itself through the bank of the respondent which is Catholic Syrian Bank Ltd., from the aforesaid letter of the Indian Overseas Branch, we find that the cheque was presented on 15-10-1994 (in clearing). The lawyer's notice to the respondent being of 4th October, which had been replied on 12th from Cochi, which is the place of the respondent, whereas the Advocate who issued notice on behalf of the appellant was at Thrissur, *it would seem to us that the first cheque had even been presented after the instruction of 'stop payment' issued by the appellant had become known to the respondent*."

With the above observations, the complaint under Section 138 of the Act was quashed.

18. The aforesaid propositions in both these reported judgments, in our considered view, with great respect are contrary to the spirit and object of Sections 138 and 139 of the Act. If we are to accept this proposition it will make Section 138 a dead letter, for, by giving instructions to the bank to stop payment immediately after issuing a cheque against a debt or liability the drawer can easily get rid of the penal consequences notwithstanding the fact that a deemed offence was committed. Further the following observations in para 6 in ***Electronics Trade & Technology Development Corpn. Ltd.***

> "Section 138 intended to prevent dishonesty on the part of the drawer of negotiable instrument to draw a cheque without sufficient funds in his account maintained by him in a bank and induce the payee or holder in due course to act upon it. *Section 138 draws presumption that one commits the offence if he issues the cheque dishonestly*"

in our opinion, do not also lay down the law correctly.

19. Section 138 of the Act is a penal provision wherein if a person draws a cheque on an account maintained by him with the banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other

liability, is returned by the bank unpaid, on the ground either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence. The distinction between the deeming provision and the presumption is well discernible. To illustrate, if a person draws a cheque with no sufficient funds available to his credit on the date of issue, but makes the arrangement or deposits the amount thereafter before the cheque is put in the bank by the drawee, and the cheque is honoured, in such a situation drawing of presumption of dishonesty on the part of the drawer under Section 138 would not be justified. Section 138 of the Act gets attracted only when the cheque is dishonoured.

20. On a careful reading of Section 138 of the Act, we are unable to subscribe to the view that Section 138 of the Act draws presumption of dishonesty against drawer of the cheque if he without sufficient funds to his credit in his bank account to honour the cheque issues the same and, therefore, this amounts to an offence under Section 138 of the Act. For the reasons stated hereinabove, we are unable to share the views expressed by this Court in the above two cases and we respectfully differ with the same regarding interpretation of Section 138 of the Act to the limited extent as indicated above.

21. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial. It is for this reason we are of the considered opinion that the complaints of the appellant could not have been dismissed by the High Court at the threshold. In the result the appeals succeed.

* * * * *

Kusum Ingots & Alloys Ltd. v. *Pennar Peterson Securities Ltd.*

(2000) 2 SCC 745 : AIR 2000 SC 954

D.P. MOHAPATRA, J. – 2. The common question that arises for consideration in these appeals is whether a company and its directors can be proceeded against for having committed an offence under Section 138 of the Negotiable Instruments Act, 1881 ("the NI Act") after the company has been declared sick under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985 ("the SICA") before the expiry of the period for payment of the cheque amount. The answer to the question depends on interpretation of Section 138 of the NI Act and its interaction with the relevant provisions of SICA. Since the relevant facts involved in all the cases are similar and a common question of law arises in all the cases they were heard together and they are being disposed of by this judgment.

3. The factual positions about which there is no dispute may be stated thus: post-dated cheques were issued on behalf of the Company in favour of the complainant in course of business of the Company. When the complainant presented the cheques in the bank they were returned without payment. Then the complainant issued notice to the Company and/or its Directors stating the facts of dishonour of the cheques and demanding payment. Since no payment was made within the period of 15 days stipulated under the NI Act the payee filed complaint against the Company and/or its Directors alleging, inter alia, that they had committed an offence under Section 138 of the NI Act. Before the cheques were presented in the bank or after the bank declined to honour the cheques the drawer Company was declared sick under the provisions of SICA by the Board of Industrial and Financial Reconstruction ("the BIFR"). On receipt of the summons from the Court in the criminal case registered on the basis of the complaint the accused Company and/or its Directors filed petitions under Section 482 of the Code of Criminal Procedure or under Article 227 of the Constitution seeking quashing of the complaint/proceedings in the criminal case, mainly on the ground that in view of the provisions in Section 22 of SICA the criminal case instituted against them for commission of the alleged offence under Section 138 NI Act is misconceived and compelling the accused to face trial in the case will amount to abuse of the process of court. The High Court having declined to interfere in the proceeding and dismissed the petitions filed by the accused, they have filed these appeals challenging the order passed by the High Court.

4. The main thrust of the arguments of the learned counsel appearing for the appellants is that on the Company being declared sick by BIFR no steps could be taken by the complainants for realisation of the amounts said to be due to them and therefore the criminal proceedings initiated against the drawer Company and its Directors on the allegation that the cheques drawn in favour of the complainant were dishonoured by the bank is misconceived and should be quashed; alternatively it is their contention that the proceedings in the criminal case should be stayed or suspended till the accused Company becomes a functional and viable unit. On behalf of the appellants reliance is placed on Sections 22 and 22-A of SICA.

5. The learned counsel appearing for the respondents on the other hand contend that on the undisputed fact-situation of the case a prima facie case under Section 138 of the NI Act is made out against the accused and on being satisfied about this position the learned Magistrate

took cognisance of the offence and ordered issue of summons to the appellants. It is their submission that Section 22 has no application to criminal proceedings and that the said section does not bar payment of dues by the accused company or its directors; an embargo is placed only on the creditors from realising their dues from the company by a proceeding for winding up or execution or distress. It is also the submission of learned counsel for the respondents that the criminal case cannot be said to be a proceedings for realisation of money due from the company.

8. It is relevant to note here that Chapter XVII of the NI Act in which the aforementioned sections are included was inserted in the Act w.e.f. 1-4-1989 by Act 66 of 1988. The object of bringing Section 138 on statute is to inculcate faith in the efficacy of banking operations and credibility in transacting business on negotiable instruments.

10. On a reading of the provisions of Section 138 of the NI Act it is clear that the ingredients which are to be satisfied for making out a case under the provision are:

(*i*) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain amount of money to another person from out of that account for the discharge of any debt or other liability;

(*ii*) that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(*iii*) that cheque is returned by the bank unpaid, either because the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(*iv*) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(*v*) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

11. If the aforementioned ingredients are satisfied then the person who has drawn the cheque shall be deemed to have committed an offence. In the explanation to the section clarification is made that the phrase “debt or other liability” means a legally enforceable debt or other liability.

12. Section 141 NI Act is a provision specifically dealing with the offences by companies. Therein it is laid down, inter alia, that if the person committing an offence under Section 138 of the NI Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Under the proviso to sub-section (1) it is laid down that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his

knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

13. Sub-section (2) of the section makes any director/manager/secretary or other officer of the company in connivance or any neglect on the part of whom, an offence under the Act has been committed by the company, such director/manager/secretary or other officer is deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

14. From the facts of the case alleged by the complainant, the gist of which has been noted earlier, the position is clear that no exception can be taken against the order of the Magistrate taking cognisance of the offence under Section 138 of the NI Act against the appellants. Undisputedly the cheques were drawn by the appellants for payment of a certain amount of money due to the complainant, from the account in the bank and the said cheques were dishonoured by the bank and the amount remained unpaid even after a lapse of 15 days from the date of the notice issued by the complainant after the cheques were dishonoured. Therefore, the ingredients of Section 138 being prima facie established from the complaint and the documents filed with it, the Magistrate rightly took cognisance of the offence and issued summons to the appellants.

15. The next question for consideration is whether under the provisions of SICA there was any legal impediment for payment of the amount for which the cheques were drawn and for that reason the appellants cannot be taken to have committed an offence under Section 138 of the NI Act. A bare reading of Section 22 of SICA makes the position clear that during pendency of an inquiry under Section 16 or during the preparation of a scheme referred to under Section 17 or during implementation of a sanctioned scheme or pendency of an appeal under Section 25, no proceedings for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company, shall lie or be proceeded with further, except with the consent of the Board or the appellate authority, as the case may be. The section only deals with proceedings for recovery of money or for enforcement of any security or a guarantee in respect of any loans or advance granted to the company and a proceedings for winding up of the company. The section does not refer to any criminal proceedings.

16. A contention was raised on behalf of the appellants that if the criminal case is proceeded with and the appellants are convicted and sentenced to fine then it will be necessary to realise the amount of fine from the assets of the Company which would be impermissible in view of the provisions of Section 22 of SICA. We have no hesitation in rejecting this contention.

17. Another contention which was raised on behalf of the appellant in this connection is that if the Directors of the Company on being convicted are arrested and kept in jail the efforts of BIFR for reconstruction/revival of the Company will not be possible and in that event the very purpose of inquiry by BIFR will be rendered futile. The contention is too remote and the apprehension far-fetched. We reject the said contention.

18. In our considered view Section 22 SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence under Section 138 of the NI Act against a company or its directors. The section as we read it only creates an embargo against disposal of assets of the company for recovery of its debts. The purpose of such an embargo is to preserve the assets of the company from being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its directors to other persons for satisfaction of their legally enforceable dues.

19. The question that remains to be considered is whether Section 22-A of SICA affects a criminal case for an offence under Section 138 NI Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets — (*a*) during the period of preparation or consideration of the scheme under Section 18; and (*b*) during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of Section 20 and up to commencement of the proceedings relating to the winding up before the High Court concerned. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which BIFR has submitted its report declaring a company as "sick" and has also issued a direction under Section 22-A restraining the company or its directors not to dispose of any of it assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence under Section 138 NI Act cannot be instituted during the period in which the restraint order passed by BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of BIFR under Section 22-A was passed against the Company then it cannot be said that the offence under Section 138 NI Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the Company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the Company in view of the ban order passed by BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case.

20. Except in the circumstances noted above we do not find any good reason for accepting the contentions raised by the learned counsel for the appellants in favour of the prayer for quashing the criminal proceedings or for keeping the proceedings in abeyance. It will be open to the appellants to place relevant materials in this regard before the learned Magistrate before whom the cases are pending and the learned Magistrate will examine the matter keeping in mind the discussions made in this judgment. We make it clear that we have not considered the question whether in the facts and circumstances of a particular case Section 138 NI Act is attracted or not, for that is a question to be considered by the Court at the appropriate stage of the case in the light of the evidence on record. The appeals are disposed of on the terms aforesaid.

Dalmia Cement (Bharat) Ltd. v. *Galaxy Traders & Agencies Ltd.*

(2001) 6 SCC 463 : AIR 2001 SC 676

R.P. SETHI, J. -The complaint filed under Section 138 of the Negotiable Instruments Act, 1881 ("the Act") was quashed by the High Court vide the judgment impugned in this appeal holding that the same was barred by time as the complainant had allegedly failed to file it within the statutory period from the date of accruing of the cause of action.

2. In order to appreciate the legal submissions, a résumé of facts of the case is necessary. In its complaint, the appellant Company had stated that Accused 2 to 9 who are partners of the respondent Firm purchased cement from it and issued cheque for Rs 9,13,353.84 on 26-5-1998 which was drawn on Karur Vysa Bank Ltd., Ernakulam Branch. When presented for collection, the cheque was dishonoured on account of insufficiency of funds in the account of the accused. The information regarding non-payment of the cheque amount was communicated by the bank to the complainant on 2-6-1998. The complainant on 13-6-1998, through its advocate, issued a statutory notice in terms of Section 138 of the Act intimating Respondents 1 and 2 regarding the dishonour of the cheque and calling upon the respondents to pay the said amount within a period of 15 days from the receipt of the said notice. The postal acknowledgement receipt of the notice, served upon the respondents, was received by the complainant on 15-6-1998. However, Respondents 1 and 2, vide their letter dated 20-6-1998, which was received by the advocates of the appellant on 30-6-1998, intimated that they had in effect received empty envelopes without any contents and requested the appellant to mail the contents. It is worth noticing that by the time the complainant received the intimation of the respondents, the statutory period of filing the complaint was about to expire. Believing the averments of the respondents to be true, though not admitting but as an abundant caution the appellant presented the cheque again on 1-7-1998 to the drawee bank through their bankers. The cheque was again dishonoured by the drawee bank on 2-7-1998. A registered statutory notice was issued to the accused intimating the dishonour of the cheque and the payment was demanded. The accused received the said notice on 27-7-1998 but did not make the payment. According to the complainant, the accused on 6-7-1998 (*sic* 6-8-1998) sent a registered cover to its Ernakulam office which contained some waste newspaper bits. As despite dishonour of the cheque and receipt of notice, the cheque amount was not paid, the appellant filed the complaint on 9-9-1998, admittedly, within the statutory period from the second notice. The Additional Chief Judicial Magistrate, Ernakulam took cognizance and issued process to the respondents. Instead of appearing before the Magistrate, the respondents filed a petition under Section 482 of the Code of Criminal Procedure in the High Court praying for quashing the complaint on the ground that the same was barred by limitation which was disposed of vides the judgment impugned in this appeal.

3. The Act was enacted and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a

cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality of being negotiated and are easily passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country.

4. Section 138 of the Act makes a civil transaction to be an offence by fiction of law. Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person is returned by the bank unpaid either because of the amount or money standing to the credit of that person being insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account, such person, subject to the other conditions, shall be deemed to have committed an offence under the section and be punished for a term which may extend to one year or with fine which may extend to twice the amount of cheque or with both. To make the dishonour of the cheque as an offence, the aggrieved party is required to present the cheque to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier and the payee or the holder in due course of the cheque makes a demand for payment of the cheque amount by giving a notice in writing to the drawer of the cheque within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and drawer of such cheque fails to make the payment of the amount within 15 days of the receipt of the said notice. Section 139 refers to presumption that unless the contrary is proved, the holder received the cheque of the nature referred to under Section 138 for the discharge in whole or in part or of any debt or other liability. Section 140 restricts the defence in any prosecution under Section 138 of the Act and Section 141 refers to such offence committed by the companies. Section 142 provides that, notwithstanding anything contained in the Code of Criminal Procedure, no court shall take cognizance of an offence under the section except upon a complaint in writing made by the payee or, as the case may be, the holder of the cheque and that such complaint is made within one month of the date on which the cause of action arose under clause (*c*) of proviso to Section 138 of the Act.

6. To constitute an offence under Section 138 of the Act, the complainant is obliged to prove its ingredients which include the receipt of notice by the accused under clause (*b*). It is to be kept in mind that it is not the "giving" of the notice which makes the offence but it is the "receipt" of the notice by the drawer which gives the cause of action to the complainant to file the complaint within the statutory period. This Court in ***K. Bhaskaran*** **v.** ***Sankaran***

Vaidhyan Balan [(1999) 7 SCC 510] considered the difference between "giving" of a notice and "receipt" of the notice and held:

"*18*. On the part of the payee he has to make a demand by 'giving a notice' in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such 'giving', the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days 'of the receipt' of the said notice. It is, therefore, clear that 'giving notice' in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.

19. In ***Black's Law Dictionary*** 'giving of notice' is distinguished from 'receiving of the notice': 'A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it.' A person 'receives' a notice when it is duly delivered to him or at the place of his business.

20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

21. In ***Maxwell's Interpretation of Statutes*** the learned author has emphasised that 'provisions relating to giving of notice often receive liberal interpretation'. The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in clause (*b*) of the proviso to Section 138 of the Act show that the payee has the statutory obligation to 'make a demand' by giving notice. The thrust in the clause is on the need to 'make a demand'. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is despatched his part is over and the next depends on what the sendee does.

22. It is well settled that a notice refused to be accepted by the addressee can be presumed to have been served on him.

23. Here the notice is returned as unclaimed and not as refused. Will there be any significant difference between the two so far as the presumption of service is concerned? In this connection a reference to Section 27 of the General Clauses Act will be useful. The section reads thus:

'27. *Meaning of service by post*.- Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served

by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of posts.' "

7. Section 27 of the General Clauses Act deals with the presumption of service of a letter sent by post. The despatcher of a notice has, therefore, a right to insist upon and claim the benefit of such a presumption. But as the presumption is a rebuttable one, he has two options before him. One is to concede to the stand of the sendee that as a matter of fact he did not receive the notice, and the other is to contest the sendee's stand and take the risk for proving that he, in fact, received the notice. It is open to the despatcher to adopt either of the options. If he opts for the former, he can afford to take appropriate steps for the effective service of notice upon the addressee. Such a course appears to have been adopted by the appellant Company in this case and the complaint filed, admittedly, within limitation from the date of the notice of service conceded to have been served upon the respondents.

8. In ***Sadanandan Bhadran* v. *Madhavan Sunil Kumar*** [(1998) 6 SCC 514], this Court held that clause (*a*) of the proviso to Section 138 did not put any embargo upon the payee to successively present a dishonoured cheque during the period of its validity. On each presentation of the cheque and its dishonour a fresh right and not cause of action accrues. The payee or holder of the cheque may, therefore, without taking pre-emptory action in exercise of his right under clause (*b*) of Section 138 of the Act, go on presenting the cheque so as to enable him to exercise such right at any point of time during the validity of the cheque. But once a notice under clause (*b*) of Section 138 of the Act is "received" by the drawer of the cheque, the payee or the holder of the cheque forfeits his right to again present the cheque as cause of action has accrued when there was failure to pay the amount within the prescribed period and the period of limitation starts to run which cannot be stopped on any account. This Court emphasised that "needless to say the period of one month from filing the complaint will be reckoned from the date immediately falling the day on which the period of 15 days from the *date of the receipt of the notice* by the drawer expires".(emphasis supplied)

10. It is conceded in this case that in response to the notice sent by the appellant through their counsel on 13-6-1998, the respondents herein, vide their letter dated 20-6-1998, intimated "received one empty envelope without any content in it. Therefore request you to kindly send the content, if any". This intimation was received by the appellant on 30-6-1998, the day on which the period of limitation on the basis of earlier notice was to expire. They had exercised the option to accept the averments made by the respondents in their letter dated 20-6-1998 and issued a fresh notice after again presenting the cheque. The respondents have not denied the issuance of their letter dated 20-6-1998. Despite admitting its contents, they opted to approach the High Court for quashing the proceedings merely upon assumption, presumption and conjectures. They tried to blow hot and cold in the same breath, stating on the one hand that the notice of dishonour had not been received by them and on the other praying for dismissal of the complaint on the plea that the complaint was barred by time in view of the notice served by the appellant, which they had not received. The plea of the

respondents was not only contradictory, and an afterthought, but apparently carved out to resist the claim of the complainant and thereby frustrate the provisions of law.

11. The High Court fell in error by not referring to the letter of the respondents dated 20-6-1998 and quashing the proceedings merely by reading a line from para 6 of the complaint. The appellant in para 7 of their complaint had specifically stated that:

> "Even though the complainant is not admitting the said allegation, on abundant caution the complainant presented the cheque again on 1-7-1998 to the drawee bank through the complainant's bankers, Punjab National Bank. The cheque was again dishonoured by the drawee bank on 2-7-1998; a registered lawyer notice was issued to the 1st accused Firm as well as to the 2nd accused intimating the dishonour of the cheque and demanding payment. The accused have received the notice on 27-7-1998. The accused did not make any payment so far."

The receipt of the second notice has concededly not been denied by the respondents.

12. Under the circumstances the appeal is allowed and the order of the High Court quashing the complaint filed by the appellant is set aside.

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Suganthi Suresh Kumar v. *Jagdeeshan*

AIR 2002 SC 681 : 2002 (2) SCC 420

K.T. THOMAS, J. – Appellant in this case is the complainant before the court of 9th Metropolitan Magistrate, Saidapet, Chennai. The offence pitted against the respondent was under Section 138 of the Negotiable Instruments Act. In fact there were two complaints arising out of two sets of cheques which were dishonoured by the drawee bank. The trial Magistrate after holding the respondent guilty of the offence convicted him of the aforesaid offence but sentenced him only to undergo imprisonment till rising of the Court and pay a fine of Rs. 5000/- in both cases. Apparently the respondent was happy and therefore he did not prefer any appeal. But the complainant/appellant was unhappy and therefore he preferred two revisions before the High Court on the premise that the sentence was grossly inadequate. He contended before the High Court that the trial magistrate should at least have invoked the provision under Section 357(3) of the Code of Criminal Procedure.

3. However the learned single judge of the High Court of Madras was not inclined to interfere with the sentence passed on the respondent and therefore he dismissed both the revisions. Nonetheless learned single judge has chosen this opportunity to send a message to the trial magistrates "to keep in mind the object of providing stringent punishment and the guidelines given by the Apex Court in ***Pankaj Bhai Nagjibhai Patel* v. *State of Gujarat*** [2001 (2) SCC 595]". Nor did the High Court invoke Section 357(3) of the code.

4. Mr. K.V. Viswanathan, learned counsel for the petitioner invited our attention to the following observations made by this Court in ***K. Bhaskaran* v. *Sankaran Vaidhyan Balan*** [1999 (7) SCC 510]:

> "If a Judicial Magistrate of the First Class were to order compensation to be paid to the complainant from out of the fine realized, the complainant will be the loser when the cheque amount exceeded the said limit. In such a case a complainant would get only the maximum amount of rupees five thousand. But the Magistrate in such cases can alleviate the grievance of the complainant by resorting to Section 357(3) Cr. P.C. The Supreme Court had emphasised the need for making liberal use of that provision. No limit is mentioned in the sub-section and therefore, a Magistrate can award any sum as compensation. Of course while fixing the quantum of such compensation the Magistrate has to consider what would be the reasonable amount of compensation payable to the complainant. Thus, even if the trial was before a Court of a Magistrate of the first Class in respect of a cheque which covers an amount of Rs. 5,000/- the Court has power to award compensation to be paid to the complainant".

5. In the said decision this Court reminded all concerned that it is well to remember the emphasis laid on the need for making liberal use of Section 357(3) of the Code. This was observed by reference to a decision of this Court in ***Hari Singh* v. *Sukhbir Singh*** [1988(4) SCC 551]. In the said decision this Court held as follows:-

> "The quantum of compensation may be determined by taking into account the nature of crime, justness of the claim by the victim and the ability of accused to pay.

> If there are more than one accused they may be asked to pay in equal terms, unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. *The court may enforce the order by imposing sentence in default"*. (emphasis supplied)

6. Our attention has been brought to a decision rendered by a single judge of the High Court of Kerala vide ***Rajendra* v. *Jose*** [2001(3) Kerala Law Times 431]. Learned Judge has directed that the decision of this Court in ***Hari Singh* v. *Sukhbir Singh*** is not to be followed as this Court laid down the said legal proposition without adverting to Section 431 of the Code. The Single Judge of the High Court of Kerala by-passed the legal proposition made by the apex court in the following manner:

> "The learned Sessions Judge imposed a sentence in default on the basis of the observation made by the apex court in ***Hari Kishan*** and ***State of Haryana* v. *Sukhbir Singh*** [AIR 1988 SC 2127], that court may enforce the order by imposing sentence in default. It appears that while disposing of that appeal, attention of apex court was not drawn specifically to the provisions of Section 431 Cr. P.C. providing for recovery of money (other than fine) payable by virtue of any order made under the Criminal Procedure Code".

7. Saying so, the learned single judge set aside "that part of the order passed by the sessions court directing the accused to undergo simple imprisonment for a period of six months in case of his committing default in payment of the compensation awarded".

8. Thereafter the learned single judge cited another decision of this Court in ***Balraj* v. *State of U.P.*** [AIR 1995 SC 1935]. It related to a murder case. Apart from the sentence of imprisonment, this Court awarded compensation and directed the amount to be collected under Section 431 of the Code. But there is not even a remote hint in the said decision doubting the correctness of the legal proposition adopted in ***Hari Singh* v. *Sukhbir Singh***. In other words, the said legal position remains in force as no other bench of this Court has even chosen to depart from it.

9. It is impermissible for the High Court to overrule the decision of the apex court on the ground that Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding on all courts within the territory of India. It was pointed out by this Court in ***Anil Kumar Neotia* v. *Union of India*** [AIR 1988 SC 1353] that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court.

10. That apart, Section 431 of the Code has only prescribed that any money (other than fine) payable by virtue of an order made under the Code shall be recoverable "as if it were a fine". Two modes of recovery of the fine have been indicated in Section 421(1) of the Code. The proviso to the sub-section says that if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue such warrant for levy of the account.

11. When this Court pronounced in ***Hari Singh*** **v.** ***Sukhbir Singh*** that a court may enforce an order to pay compensation "by imposing a sentence in default" it is open to all courts in India to follow the said course. The said legal position would continue to hold good, until a larger bench of this Court overrules it. Hence learned single Judge of the High Court of Kerala has committed an impropriety by expressing that the subordinate courts in Kerala should not follow the said legal direction of this Court. We express our disapproval of the course adopted by the said Judge in ***Rajendran*** **v.** ***Jose***. It is unfortunate that when the Sessions Judge has correctly done a course in accordance with the discipline, the Single Judge of the High Court has incorrectly reversed it.

12. The total amount covered by the cheques involved in the present two cases was Rs. 4,50,000/-. There is no case for the respondent that the said amount had been paid either during the pendency of the cases before the trial court or revision before the High Court or this Court. If the amounts had been paid to the complainant, there perhaps would have been justification for imposing a flee-bite sentence as had been chosen by the trial court. But in a case where the amount covered by the cheque remained unpaid, it should be the lookout of the trial magistrates that the sentence for the offence under Section 138 should be of such a nature as to give proper effect to the object of the legislation. No drawer of the cheque can be allowed to take dishonour of the cheque issued by him light heartedly. The very object of enactment of provisions like 138 of the Act would stand defeated if the sentence is of the nature passed by the trial Magistrate. It is a different matter if the accused paid the amount atleast during the pendency of the case.

14. As we propose to remit the case back to the trial Court, we do not wish to indicate what exactly should be the limit of proper sentence to be passed. The trial Magistrate shall hear both sides once again in the matter of sentence and pass a sentence that is condign. We, therefore, set aside the sentence passed on the respondent and remit the case back to the trial Magistrate for passing appropriate sentence on the respondent after hearing both sides.

15. Learned counsel for the respondent made a plea that if the respondent is able to make payment of the amount covered by the cheques, he shall not be debarred from taking up the plea for mitigation of the sentence. The respondent will be entitled to make such a plea in the event of his succeeding in paying the amount covered by the cheques.

16. Appeals are disposed of in the above terms.

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M.M.T.C. Ltd. v. *Medchl Chemicals and Pharma (P) Ltd.*

(2002) 1 SCC 234 : AIR 2002 SC 182

S.N. VARIAVA, J. - 3. These appeals are against a judgment dated 18-12-1998. By this common judgment two complaints, filed by the appellants, under Section 138 of the Negotiable Instruments Act have been quashed.

4. The appellant is a Government of India company, incorporated under the Companies Act. The appellant has a regional office at Chennai. The 1st respondent is also a company. The 2nd and 3rd respondents were/are the Directors of the 1st respondent Company. It is stated that the 2nd respondent has now died.

5. The appellant and the 1st respondent entered into a memorandum of understanding dated 1-6-1994. This memorandum of understanding was slightly altered on 19-9-1994. Pursuant to the memorandum of understanding two cheques, one dated 31-10-1994 in a sum of Rs 20,26,995 and another dated 10-11-1994 in a sum of Rs 22,10,156, were issued by the 1st respondent in favour of the appellant. Both the cheques when presented for payment were returned with the endorsement "payment stopped by drawer". Two notices were served by the appellant on the 1st respondent. As the amounts under the cheques were not paid the appellants lodged two complaints through one Lakshman Goel, the Manager of the regional office of the appellant.

6. The respondents filed two petitions for quashing of the complaints. By the impugned order both the complaints have been quashed.

7. At this stage it must be mentioned that the respondents had also issued, to the appellants, four other cheques. Those cheques were also dishonoured when presented for payment. Four other complaints, under Section 138 of the Negotiable Instruments Act, had also been filed by the appellants. Those four complaints had also been lodged by the same Shri Lakshman Goel. In those four cases the respondents filed separate applications for discharge. Those discharge applications were on identical grounds as urged by the respondents in the two petitions for quashing the complaints. The Magistrate accepted the contention and discharged the respondents. The High Court allowed the revision filed by the appellants and set aside the order of discharge. The High Court held, as between the same parties, that the Magistrate had erred in holding that the complaints filed by Lakshman Goel were not maintainable. The High Court held that, at this stage, it was not possible to accept defence that the complainant-appellants were not entitled to present the cheques as the respondents had expected the goods. The High Court restored the four complaints and directed the Magistrate to proceed with the trial in accordance with law. The respondents filed SLPs before this Court which were summarily dismissed.

8. In this case the respondents have taken identical contentions in their petitions to quash the complaints viz. that the complaints filed by Mr Lakshman Goel were not maintainable and that the cheques were not given for any debt or liability. It was pointed out to the learned Judge that, between the same parties and on identical facts, it had already been held that case for discharge was made out. Yet the learned Judge chose to ignore those findings and proceeded to hold to the contrary.

9. In the impugned judgment it has been held that the complaints filed by Mr Lakshman Goel were not maintainable. It was noticed that in those two complaints, at a subsequent stage, one Mr Sampath Kumar, the Deputy General Manager of the appellant was allowed to represent the appellants. The High Court held that it is only an Executive Director of the Company who has the authority to institute legal proceedings. It is held that the complaint could only be filed by a person who is in charge of or was responsible to the Company. It is held that authorisation must be on the date when the complaint is filed and a subsequent authorisation does not validate the complaint. It is held that the absence of a complaint by a duly delegated authority is not a mere defect or irregularity which could be cured subsequently. It is held that if the record does disclose any authorisation, then taking cognizance of the complaint was barred by Section 142(*a*) of the Negotiable Instruments Act. It has been held that the Senior Manager (who had lodged the complaints) and the Deputy General Manager (who was substituted) had not been authorised by the Board of Directors to sign and file the complaint on behalf of the Company or to prosecute the same. It is held that the Manager or the Deputy General Manager were mere paid employees of the Company. It is then held as follows:

> "Therefore, it is clear that the legal position as crystallised by the rulings is to the effect that a complaint under Section 138 of the Negotiable Instruments Act can be filed for and on behalf of a body such as corporation, who has only artificial existence through a particular mode and when that mode is not followed, any proceedings initiated or any complaint filed will be vitiated from its very inception. In my opinion, here, the complaint is signed and presented by a person, who is neither an authorised agent nor a person empowered under the articles of association or by any resolution of the Board to do so. Hence, the complaint is not maintainable. The taking of cognizance of such a complaint is legally not acceptable. Hence, these two complaints filed for and on behalf of M.M.T.C. Limited against the petitioners herein, which were taken on file in CCs Nos. 3324 and 3325 of 1995 are not maintainable at all and that cognizance of the said complaints ought not to have been taken by the Magistrate."

10. In our view the reasoning given above cannot be sustained. Section 142 of the Negotiable Instruments Act provides that a complaint under Section 138 can be made by the payee or the holder in due course of the said cheque. The two complaints, in question, are by the appellant Company who is the payee of the two cheques.

11. This Court has, as far back as, in the case of ***Vishwa Mitter* v. *O.P. Poddar*** [(1983) 4 SCC 701] held that it is clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance. It has been held that no court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. In the present case, the only eligibility criteria prescribed by Section 142 is that the complaint must be by

the payee or the holder in due course. This criterion is satisfied as the complaint is in the name and on behalf of the appellant Company.

12. In the case of ***Associated Cement Co. Ltd.* v. *Keshvanand*** [(1998) 1 SCC 687], it has been held by this Court that the complainant has to be a corporeal person who is capable of making a physical appearance in the court. It has been held that if a complaint is made in the name of an incorporeal person (like a company or corporation) it is necessary that a natural person represents such juristic person in the court. It is held that the court looks upon the natural person to be the complainant for all practical purposes. It is held that when the complainant is a body corporate it is the de jure complainant, and it must necessarily associate a human being as de facto complainant to represent the former in court proceedings. It has further been held that no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone, can continue to represent the company till the end of the proceedings. It has been held that there may be occasions when different persons can represent the company. It has been held that it is open to the de jure complainant company to seek permission of the court for sending any other person to represent the company in the court. Thus, even presuming, that initially there was no authority, still the company can, at any stage, rectify that defect. At a subsequent stage the company can send a person who is competent to represent the company. The complaints could thus not have been quashed on this ground.

13. The learned Judge has next gone into facts and arrived at a conclusion that the cheques were issued as security and not for any debt or liability existing on the date they were issued. In so doing the learned Judge has ignored the well-settled law that the power of quashing criminal proceedings should be exercised very stringently and with circumspection. It is settled law that at this stage the Court is not justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the complaint. The inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice. At this stage the Court could not have gone into merits and/or come to a conclusion that there was no existing debt or liability.

14. It is next held as follows:

> "This is a special provision incorporated in the Negotiable Instruments Act. It is necessary to allege specifically in the complaint that there was a subsisting liability and an enforceable debt and to discharge the same, the cheques were issued. But, we do not find any such allegation at all. The absence of such vital allegation considerably impairs the maintainability."

15. In the case of ***Maruti Udyog Ltd.* v. *Narender*** [(1999) 1 SCC 113], this Court has held that, by virtue of Section 139 of the Negotiable Instruments Act, the court has to draw a presumption that the holder of the cheque received the cheque for discharge of a debt or liability until the contrary is proved. This Court has held that at the initial stage of the proceedings the High Court was not justified in entertaining and accepting a plea that there was no debt or liability and thereby quashing the complaint.

17. There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no

existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability.

18. Lastly it was submitted that a complaint under Section 138 could only be maintained if the cheque was dishonoured for reason of funds being insufficient to honour the cheque or if the amount of the cheque exceeds the amount in the account. It is submitted that as payment of the cheques had been stopped by the drawer one of the ingredients of Section 138 was not fulfilled and thus the complaints were not maintainable.

19. Just such a contention has been negatived by this Court in the case of ***Modi Cements Ltd.* v. *Kuchil Kumar Nandi*** [(1998) 3 SCC 249]. It has been held that even though the cheque is dishonoured by reason of "stop-payment" instruction an offence under Section 138 could still be made out. It is held that the presumption under Section 139 is attracted in such a case also. The authority shows that even when the cheque is dishonoured by reason of stop-payment instructions by virtue of Section 139 the court has to presume that the cheque was received by the holder for the discharge, in whole or in part, of any debt or liability. Of course this is a rebuttable presumption. The accused can thus show that the "stop-payment" instructions were not issued because of insufficiency or paucity of funds. If the accused shows that in his account there were sufficient funds to clear the amount of the cheque at the time of presentation of the cheque for encashment at the drawer bank and that the stop-payment notice had been issued because of other valid causes including that there was no existing debt or liability at the time of presentation of cheque for encashment, then offence under Section 138 would not be made out. The important thing is that the burden of so proving would be on the accused. Thus a court cannot quash a complaint on this ground.

20. In this view of the matter, the impugned judgment cannot be sustained and is set aside. The learned VIIth Metropolitan Magistrate, G.T. Chennai is directed to proceed with the complaints against Respondents 1 and 3 in accordance with law. It is made clear that the setting aside of the impugned order will not tantamount to preventing the respondents from taking, at the trial, pleas available to them including those taken herein.

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Goaplast (P) Ltd. v. *Chico Ursula D'souza*

(2003) 3 SCC 232 : AIR 2003 SC 2035

ARUN KUMAR, J. - 2. These appeals involve a pure question of law as to applicability of Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") to a case in which a person issuing a post-dated cheque stops its payment by issuing instructions to the drawee bank before the due date of payment. The facts involved in all the appeals are almost similar, except variations in dates and amounts of cheques involved in each case. For the purpose of this judgment we have taken the facts in Criminal Appeal No. 315 of 2003 [arising out of SLP (Crl.) No. 2742 of 2002]. The facts are in a very narrow compass. Respondent 1 addressed a letter to the appellant on 20-7-1992 enclosing therewith ten post-dated cheques, each for an amount of Rs 40,000 by way of refund of amount due from him to the appellant. The two cheques which are the subject matter of the present appeal were dated 10-12-1994 and 10-4-1995. On 12-2-1993 Respondent 1 again wrote to the appellant denying his liability to pay the amount under the aforesaid cheques on the ground that they were issued under a mistaken belief of liability and asked the appellant to treat the cheques as invalid. Respondent 1 also wrote to the drawee bank on 15-3-1993 to stop payment of the aforesaid post-dated cheques issued by him. On 10-5-1995, the appellant presented the two cheques dated 10-12-1994 and 10-4-1995 for payment, but the said cheques were returned unpaid with the endorsement "present again" on 12-5-1995. On 24-5-1995 the appellant issued notice under Section 138 proviso (*b*) of the Act demanding payment of the amount of Rs. 80,000 i.e. the total amount of the two cheques. On failure of Respondent 1 to make the payment in pursuance of the notice, the appellant filed a complaint under Section 138 of the Act on 7-7-1995. The Magistrate concerned dismissed the complaint vide an order dated 18-10-1999, taking the view that Section 138 of the Act was not attracted in these facts. The appellant filed an appeal against the said order of the Magistrate. The Goa Bench of the Bombay High Court dismissed the appeal on 16-3-2002 upholding the view of the learned Judicial Magistrate. Both the courts primarily based their decision on a misreading of the judgment of this Court in ***Anil Kumar Sawhney*** **v.** ***Gulshan Rai*** [(1993) 4 SCC 424]. They took the view that the accused had only countermanded a bill of exchange on the date the accused wrote the letter about stopping payment of the cheques. Before the due date the instruments were merely bills of exchange and not cheques. Therefore, no offence could be said to have been made out under Section 138 of the Act. According to the courts below the payment had been stopped before the cheques became payable.

3. The learned counsel for the appellant has submitted that mere writing of letter to the bank stopping payment of the post-dated cheques does not take the case out of the purview of the Act. He has invited our attention to the object behind the provision contained in Chapter XVII of the Act. For appreciating the issue involved in the present case, it is necessary to refer to the object behind introduction of Chapter XVII containing Sections 138 to 142. This chapter was introduced in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 with the object of inculcating faith in the efficacy of banking operations and giving credibility to negotiable instruments in business transactions and in order to promote efficacy of banking operations. With the policy of

liberalisation adopted by the country, which brought about increase in international trade and commerce, it became necessary to inculcate faith in banking. World trade is carried through banking operations rather than cash transactions. The amendment was intended to create an atmosphere of faith and reliance on banking system. Therefore, while considering the question of applicability of Section 138 of the Act to a situation presented by the facts of the present case, it is necessary to keep the objects of the legislation in mind. If a party is allowed to use a cheque as a mode of deferred payment and the payee of the cheque on the faith that he will get his payment on the due date accepts such deferred payment by way of cheque, he should not normally suffer on account of non-payment. The faith, which the legislature has desired that such instruments should inspire in commercial transactions would be completely lost if parties are as a matter of routine allowed to interdict payment by issuing instruction to banks to stop payment of cheques. In today's world where use of cash in day-to-day life is almost getting extinct and people are using negotiable instruments in commercial transactions and plastic money for their daily needs as consumers, it is all the more necessary that people's faith in such instruments should be strengthened rather than weakened. Provisions contained in Sections 138 to 142 of the Act are intended to discourage people from not honouring their commitments by way of payment through cheques. It is desirable that the court should be in favour of an interpretation that serves the object of the statute. The penal provisions contained in Sections 138 to 142 of the Act are intended to ensure that obligations undertaken by issuing cheques as a mode of payment are honoured. A post-dated cheque will lose its credibility and acceptability if its payment can be stopped routinely. A cheque is a well-recognized mode of payment and post-dated cheques are often used in various transactions in daily life. The purpose of a post-dated cheque is to provide some accommodation to the drawer of the cheque. Therefore, it is all the more necessary that the drawer of the cheque should not be allowed to abuse the accommodation given to him by a creditor by way of acceptance of a post-dated cheque. If stoppage of payment of a post-dated cheque is permitted to take the case out of the purview of Section 138 of the Act, it will amount to allowing the party to take advantage of his own wrong.

4. The present case was decided by the courts below mainly on the basis of the judgment of this Court in ***Sawhney*** case. In that case this Court noted that a cheque under Section 6 of the Act is a bill of exchange drawn on a banker and is payable on demand. From this it follows that a bill of exchange though drawn on a banker, if not payable on demand is not a cheque. A post-dated cheque is only a bill of exchange when it is written or drawn. It becomes a cheque when it is payable on demand. It is not payable till the date that is shown on the face of the document. It will become a cheque only on the date shown on it, prior to that it remains a bill of exchange. In ***Sawhney*** case, this Court was concerned with the question of limitation as provided in proviso (*a*) to Section 138 of the Act. This proviso requires that a cheque should be presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. The cheques in question in ***Sawhney*** case were dated 15-12-1991 and 15-5-1991 totalling an amount of Rs 5,00,000. These cheques were returned by the banker with the endorsement "not arranged for - no fund". The payee thereafter issued notice as contemplated under Section 138 of the Act followed by complaint under Section 138 being filed in the Court of the Chief Judicial Magistrate at Karnal. It appears from the judgment that these cheques were

handed over to the payee in a settlement arrived at in a court case on 5-3-1990. The question for consideration was as to the date on which the cheques in question could be taken as drawn, in other words, what is the starting point of limitation of six months provided in proviso (*a*) to Section 138 of the Act. According to the drawer, the cheques were drawn in March 1990 when they were written and handed over to the payee. The cheques were post-dated and bore the dates mentioned hereinbefore. Proviso (*a*) to Section 138 uses the words "the date on which it is drawn". The cheques were drawn in March 1990 and were presented for encashment in the year 1991 which was beyond the period of six months provided in proviso (*a*) to Section 138 and therefore, no offence was said to be made out under Section 138. Keeping in view the object of Section 138 i.e. to enhance the acceptability of cheques by making the drawer liable for penalty in case the cheque is dishonoured, it was felt that the drawer of a post-dated cheque could defeat Section 138 of the Act by showing a date beyond six months of its delivery. An interpretation which supports the object of the provision had to be adopted. Therefore, it was held that a post-dated cheque for the purpose of clause (*a*) of the provision to Section 138 has to be considered to have been drawn on the date it bears. On the basis of Sections 5 and 6 of the Act, it was observed that:

> "A 'post-dated cheque' is only a bill of exchange when it is written or drawn, it becomes a 'cheque' when it is payable on demand. The post-dated cheque is not payable till the date, which is shown on the face of the said document. It will only become cheque on the date shown on it and prior to that it remains a bill of exchange under Section 5 of the Act. As a bill of exchange a post-dated cheque remains negotiable but it will not become a 'cheque' till the date when it becomes 'payable on demand'."

The ratio of the decision in ***Sawhney*** case is found in the following words:

> "One of the main ingredients of the offence under Section 138 of the Act is, the return of the cheque by the bank unpaid. Till the time the cheque is returned by the bank unpaid, no offence under Section 138 is made out. A post-dated cheque cannot be presented before the bank and as such the question of its return would not arise. It is only when the post-dated cheque becomes a 'cheque', with effect from the date shown on the face of the said cheque, the provisions of Section 138 come into play. The net result is that a post-dated cheque remains a bill of exchange till the date written on it. With effect from the date shown on the face of the said cheque it becomes a 'cheque' under the Act and the provisions of Section 138(*a*) would squarely be attracted. In the present case the post-dated cheques were drawn in March 1990 but they became 'cheques' in the year 1991 on the dates shown therein. The period of six months, therefore, has to be reckoned from the dates mentioned on the face of the cheques."

5. From the above it will be seen that in ***Sawhney*** case the point for consideration was the date from which the period of six months provided in proviso (*a*) to Section 138 should be counted. The Court clearly held that a post-dated cheque becomes a cheque only on the date it bears when it becomes payable on demand, and therefore, limitation will start from that date.

6. In the present case the issue is very different. The issue is regarding payment of a post-dated cheque being countermanded before the date mentioned on the face of the cheque. For the purpose of considering the issue, it is relevant to see Section 139 of the Act, which creates a presumption in favour of the holder of a cheque. Thus, it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. We are in respectful agreement with the view taken in ***Modi*** case (1998) 3 SCC 249. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.

7. ***NEPC Micon Ltd.*** **v.** ***Magma Leasing Ltd.*** [(1999) 4 SCC 253] was a case in which the drawer of the cheque closed the account in the bank before presentation of the cheque and the cheque when presented was returned by the bank with the remark "account closed". The question arose whether in this situation Section 138 of the Act would be attracted. It was contended on behalf of the appellant that Section 138 being a penal provision it should be strictly interpreted. Section 138 according to the appellant applied only in two situations i.e. either because the money standing to the credit of the account of the drawer is insufficient to honour the cheque or it exceeds the amount arranged to be paid from that account by an agreement made with the bank. Rejecting the contentions raised on behalf of the accused this Court held that return of a cheque on account of 'account being closed' would be similar to a situation where the cheque is returned on account of insufficiency of funds in the account of the drawer of the cheque. Before one closes his account in the bank, he withdraws the entire amount standing to credit in the account. Withdrawal of the entire amount would therefore mean that there were no funds in the account to honour the cheque, which squarely brings the case within Section 138 of the Act. On the question of strict interpretation of penal provisions raised on behalf of the accused it was observed:

> "If the interpretation, which is sought for, were given, then it would only encourage dishonest persons to issue cheques and before presentation of the cheque

close 'that account' and thereby escape from the penal consequences of Section 138."

Any interpretation, which withdraws the life and blood of the provision and makes it ineffective and a dead letter, should be averted. It is the duty of the court to interpret the provision consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. The legislative purpose is to permit the efficacy of banking and of ensuring that in commercial or contractual transactions, cheques are not dishonoured and credibility in transacting business through banks is maintained. We would like to quote the following observations contained in ***NEPC Micon Ltd.* v. *Magma Leasing Ltd***.:

"*15*. In view of the aforesaid discussion we are of the opinion that even though Section 138 is a penal statute, it is the duty of the court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy. As stated above, Section 138 of the Act has created a contractual breach as an offence and the legislative purpose is to promote efficacy of banking and of ensuring that in commercial or contractual transactions cheques are not dishonoured and credibility in transacting business through cheques is maintained. The above interpretation would be in accordance with the principle of interpretation quoted above 'brush away the cobweb varnish, and show the transactions in their true light' (Wilmot, C.J.) or (by Maxwell) 'to carry out effectively the breach of the statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited'. Hence, when the cheque is returned by a bank with an endorsement 'account closed', it would amount to returning the cheque unpaid because 'the amount of money standing to the credit of that account is insufficient to honour the cheque' as envisaged in Section 138 of the Act."

8. We are unable to agree with the reasoning adopted by the courts below. The impugned judgments of the High Court and the Judicial Magistrate, Ist Class, Panaji, Goa are set aside. We hold that Section 138 of the Negotiable Instruments Act will be attracted in the facts of the case. However, whether a case for punishment under that provision is made out, will depend on the outcome of the trial.

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See ***Goaplast (P) Ltd.* v. *Chico Ursula D'Souza*** [(2003) 9 SCALE 791], in which a two-judge Bench of the Court, consisting of B.P. Singh and A.R. Lakshmanan, JJ., reiterated the above decision. See also***K.R. Indira* v. *G. adinarayana*** [AIR 2003 SC 4689], in the absence of specific demand for payment, the demand notice would be invalid and the acquittal of the accused would be valid. It was, however, stated that consolidated demand notice in respect of dishonour od four cheques did not invalidate the notice.

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C.C. Alavi Haji v. *Palapetty Muhammed*

2007 (7) SCALE 380

K.G. BALAKRISHNAN, CJI & R.V. RAVEENDRAN & D.K. JAIN, JJ.

Order

2. The matter has been placed before the three Judge Bench in view of a Reference made by a two-Judge Bench of this Court, pertaining to the question of service of notice in terms of Clause (b) of proviso to Section 138 of the Negotiable Instruments Act, 1881 ('the Act'). Observing that while rendering the decision in ***D. Vinod Shivappa*** v. ***Nanda Belliappa,*** this Court has not taken into consideration the presumption in respect of an official act as provided under Section 114 of the Indian Evidence Act, 1872, the following question has been referred for consideration of the larger Bench:

> "Whether in absence of any averments in the complaint to the effect that the accused had a role to play in the matter of non-receipt of legal notice; or that the accused deliberately avoided service of notice, the same could have been entertained keeping in view the decision of this Court in ***Vinod Shivappa*** case?"

3. As it hardly needs emphasis that necessary averments in regard to the mode and the manner of compliance with the mandatory requirements of Section 138 of the Act are required to be made in the complaint, from the format of the question, the scope of controversy appears to lie in a narrow compass but bearing in mind the fact that the issue raised has wider implication with regard to the very maintainability of the complaint itself, we deem it necessary to deal with the issue in little more detail.

4. Chapter XVII of the Act originally containing Sections 138 to 142 was inserted in the Act by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 with the object of promoting and inculcating faith in the efficacy of banking system and its operations and giving credibility to negotiable instruments in business transaction. The introduction of the said Chapter was intended to create an atmosphere of faith and reliance on banking system by discouraging people from not honouring their commitments by way of payment through cheques. Section 138 of the Act was enacted to punish those unscrupulous persons who purported to discharge their liability by issuing cheques without really intending to do so. To make the provisions contained in the said Chapter more effective, some more Sections were inserted in the Chapter and some amendments in the existing provisions were made. Though, in this reference, we are not directly concerned with these amendments but they do indicate the anxiety of the Legislature to make the provisions more result oriented. Therefore, while construing the provision, the object of the legislation has to be borne in mind.

5. As noted above, the controversy arises in the context of service of notice in terms of Section 138 of the Act. The conditions pertaining to the notice to be given to the drawer, have been formulated and incorporated in Clauses (b) and (c) of the proviso to Section 138 of the Act, which read as follows:

"Provided that nothing contained in this section shall apply unless - x x x x x

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

6. As noted hereinbefore, Section 138 of the Act was enacted to punish unscrupulous drawers of cheques who, though purport to discharge their liability by issuing cheque, have no intention of really doing so. Apart from civil liability, criminal liability is sought to be imposed by the said provision on such unscrupulous drawers of cheques. However, with a view to avert unnecessary prosecution of an honest drawer of the cheque and with a view to give an opportunity to him to make amends, the prosecution under Section 138 of the Act has been made subject to certain conditions. These conditions are stipulated in the proviso to Section 138 of the Act, extracted above. Under Clause (b) of the proviso, the payee or the holder of the cheque in due course is required to give a written notice to the drawer of the cheque within a period of thirty days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. Under Clause (c), the drawer is given fifteen days time from the date of receipt of the notice to make the payment and only if he fails to make the payment, a complaint may be filed against him. As noted above, the object of the proviso is to avoid unnecessary hardship to an honest drawer. Therefore, the observance of stipulations in quoted Clause (b) and its aftermath in Clause (c) being a pre-condition for invoking Section 138 of the Act, giving a notice to the drawer before filing complaint under Section 138 of the Act is a mandatory requirement.

7. The issue with regard to interpretation of the expression 'giving of notice' used in Clause (b) of the proviso is no more res integra. In ***K. Bhaskaran* v. *Sankaran Vaidhyan Balan***, the said expression came up for interpretation. Considering the question with particular reference to scheme of Section 138 of the Act, it was held that failure on the part of the drawer to pay the amount should be within fifteen days 'of the receipt' of the said notice. 'Giving notice' in the context is not the same as 'receipt of notice'. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address and for the drawer to comply with Clause (c) of the proviso. Emphasizing that the provisions contained in Section 138 of the Act required to be construed liberally, it was observed thus:

"If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that Court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure. In **Maxwell's *Interpretation of Statutes*** the learned author has emphasized that "provisions relating to giving of

notice often receive liberal interpretation." The context envisaged in Section 138 of the Act invites a liberal interpretation for the person who has the statutory obligation to give notice because he is presumed to be the loser in the transaction and it is for his interest the very provision is made by the legislature. The words in Clause (b) of the proviso to Section 138 of the Act show that payee has the statutory obligation to 'make a demand' by giving notice. The thrust in the clause is on the need to 'make a demand'. It is only the mode for making such demand which the legislature has prescribed. A payee can send the notice for doing his part for giving the notice. Once it is dispatched his part is over and the next depends on what the sendee does."

8. Since in ***Bhaskaran***, the notice issued in terms of Clause (b) had been returned unclaimed and not as refused, the Court posed the question: "Will there be any significant difference between the two so far as the presumption of service is concerned?" It was observed that though Section 138 of the Act does not require that the notice should be given only by 'post', yet in a case where the sender has dispatched the notice by post with correct address written on it, the principle incorporated in Section 27 of the General Clauses Act, 1897 ('G.C. Act') could profitably be imported in such a case. It was held that in this situation service of notice is deemed to have been effected on the sendee unless he proves that it was not really served and that he was not responsible for such non-service.

9. All these aspects have been highlighted and reiterated by this Court recently in ***Vinod Shivappa*** case. Elaborately dealing with the situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc; it was observed that if in each such case, the law is understood to mean that there has been no service of notice, it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. It was further observed that once the payee of the cheque issues notice to the drawer of the cheque, the cause of action to file a complaint arises on the expiry of the period prescribed for payment by the drawer of the cheque. If he does not file a complaint within one month of the date on which the cause of action arises under Clause (c) of the proviso to Section 138 of the Act, his complaint gets barred by time. Thus, a person who can dodge the postman for about a month or two, or a person who can get a fake endorsement made regarding his non availability, can successfully avoid his prosecution because the payee is bound to issue notice to him within a period of 30 days from the date of receipt of information from the bank regarding the return of the cheque as unpaid. He is, therefore, bound to issue the notice, which may be returned with an endorsement that the addressee is not available on the given address. This Court held:

"We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the

complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be premature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure"

10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.

11. However, the Referring Bench was of the view that this Court in ***Vinod Shivappa*** case did not take note of Section 114 of Evidence Act in its proper perspective. It felt that the presumption under Section 114 of the Evidence Act being a rebuttable presumption, the complaint should contain necessary averments to raise the presumption of service of notice; that it was not sufficient for a complainant to state that a notice was sent by registered post and that the notice was returned with the endorsement 'out of station'; and that there should be a further averment that the addressee-drawer had deliberately avoided receiving the notice or that the addressee had knowledge of the notice, for raising a presumption under Section 114 of Evidence Act.

12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:

"**Section 114 -** ***Court may presume existence of certain facts***.- The Court may presume the existence of any fact which it thinks likely to have happened. regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume -

(f) That the common course of business has been followed in particular cases;"

13. According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

> "**27. *Meaning of service by post***. - Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression 'serve' or either of the expressions 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the

complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

16. As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138. In ***Vinod Shivappa***, this Court observed:

> "One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons."

17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran's case (supra), if the 'giving of notice' in the context of Clause (b) of the proviso was the same as the 'receipt of notice' a trickster cheque drawer would get the

premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act.

18. In the instant case, the averment made in the complaint in this regard is: "Though the complainant issued lawyer's notice intimating the dishonour of cheque and demanded payment on 4.8.2001, the same was returned on 10.8.2001 saying that the accused was 'out of station'." True, there was no averment to the effect that the notice was sent at the correct address of the drawer of the cheque by 'registered post acknowledgement due'. But the returned envelope was annexed to the complaint and it thus, formed a part of the complaint which showed that the notice was sent by registered post acknowledgement due to the correct address and was returned with an endorsement that 'the addressee was abroad.' We are of the view that on facts in hand the requirements of Section 138 of the Act had been sufficiently complied with and the decision of the High Court does not call for interference.

19. In the final analysis, with the clarification indicated hereinabove, we reiterate the view expressed by this Court in ***K. Bhaskaran*** and ***Vinod Shivappa*** cases.

20. For the reasons aforementioned, we do not find any merit in this appeal. It is dismissed accordingly but with no order as to costs in the circumstances of the case.

* * * * *

Smt. Shamshad Begum v. *B. Mohammed*

2008(13) SCALE 669

DR. ARIJIT PASAYAT, J. -. 2. Challenge in this appeal is to the judgment of a learned Single Judge of the Karnataka High Court dismissing the petition filed under Section 482 of the Code of Criminal Procedure, 1973 (the `Code'). Prayer in the petition was to quash all proceedings in CC No. 1042 of 2004 on the file of learned Vth JMF Court Mangalore. Appellant is the accused in the aforesaid case in relation to an offence punishable under Section 138 of the Negotiable Instruments Act, 1881(the `Act'). The petition was filed before the High Court on the ground that the Mangalore Court has no jurisdiction to try the case. It was stated that the agreement between the parties was entered into Bangalore and the parties live in Mangalore and the cheque were returned from the banks at Bangalore and therefore the Bangalore Court has jurisdiction to try the case.

3. In response, the respondent had submitted that before issuing notice to the appellant he had shifted his residence to Mangalore and therefore he had issued the notice from Mangalore which was received by the appellant and the reply was sent by her to the complainant to the Mangalore address.

Therefore, as one of the components of the said offence i.e. notice in writing to the drawer of the cheque demanding payment of cheque amount was sent from Mangalore, Court at Mangalore had jurisdiction to try the case. The High Court noted that one of the components of the offence was giving notice in writing to the drawer of the cheque demanding payment of the cheque amount. The said action took place within Mangalore jurisdiction and, therefore, the petition was without merit. It was however stated that if the presence of the appellant was not very necessary for continuation of the proceeding, on appropriate application being filed, the court can grant exemption from appearance.

4. In support of the appeal learned counsel for the appellant submitted that the Court at Mangalore had no jurisdiction.

5. Learned counsel for the respondent on the other hand supported the judgment of the High Court.

6. In ***K. Bhaskaran*** **v.** ***Sankaran Vaidhyan Balan*** [1999(7) SCC 510], it was *inter alia* observed as follows:

> 15. It is not necessary that all the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But a concatenation of all the above five is a sine qua non for the completion of the offence under Section 138 of the Code. In this context a reference to Section 178(d) of the Code is useful. It is extracted below:
>
> "178. (a)-(c) * * *
>
> (d) where the offence consists of several acts done in different local areas,
>
> it may be enquired into or tried by a court having jurisdiction over any of such local areas."

16. Thus it is clear, if the five different acts were done in five different localities any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act.

17. The more important point to be decided in this case is whether the cause of action has arisen at all as the notice sent by the complainant to the accused was returned as "unclaimed". The conditions pertaining to the notice to be given to the drawer, have been formulated and incorporated in clauses (b) to (c) of the proviso to Section 138 of the Act. The said clauses are extracted below:

> "(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

7. As was noted in ***K. Bhaskar*** case the offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. The acts which are components are as follows:

(1) Drawing of the cheque;
(2) Presentation of the cheque to the bank;
(3) Returning the cheque unpaid by the drawee bank;
(4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount;
(5) failure of the drawer to make payment within 15 days of the receipt of the notice.

8. It is not necessary that the above five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But concatenation of all the above five is sine qua non for the completion of the offence under Section 138 of the Act.

9. In view of the aforesaid, the judgment of the High Court does not suffer from any infirmity to warrant interference. The appeal is dismissed.

* * * * *

S.L. Construction v. *Alapati Srinivasa Rao*

(2009) 1 SCC 500

S.B. SINHA & CYRIAC JOSEPH, JJ. -. (1) Appellants before us are aggrieved by and dissatisfied with the judgment and order dated 7.6.2006 passed by a learned Single Judge of the High Court of Judicature of Andhra Pradesh at Hyderabad whereby and whereunder a petition under Section 482 of the Code of Criminal Procedure Code, 1973 praying for quashing the complaint proceedings under Section 138 and Section 142 of the Negotiable Instrument Act before the IV Additional Munsif Magistrate,Guntur taking cognizance against them under Section 138 of the Negotiable Instruments Act, 1881, was dismissed.

(3) Appellants had entered into some business transactions in regard to supply of certain materials with Respondent No.1. Appellant No.2 as a proprietor of appellant No.1 issued a cheque for a sum of Rs. 2 lacs in favour of the complainant-respondent on or about 22.6.2003. Appellants contend that the said cheque was issued by way of security.

(4) The said cheque was presented in the bank on 23.6.2003. It was returned un-paid by the banker of the appellants on the ground of insufficient funds.

(5) Another notice was sent for service on the proprietor of S.L. Structures and Engineers on or about 8.7.2003. However, admittedly, the said notice was not served upon the appellants.

(6) The said cheque was again presented before the bank on 30.8.2003, and was again dishonoured.

(7) Respondents served another notice upon the appellant No.2 describing him as a proprietor of S.L. Structures and Engineers and calling upon him to pay the said amount of Rs. 2 lacs within 15 days from the date of receipt thereof.

(8) However, in response thereto the appellants' advocate by a letter dated 19.9.2003 pointed out that in stead and place of S.L.Structures and Engineers, the notice should have been sent to S.L.Constructions. It was stated thus:

> "That instead of sending the notice to S.L. constructions you send the notice to my client Shri K.P.Raju Proprietor of S.L.Structures and Engineers, Nagpur which is illegal. That by issuing such wrong and illegal notice your client lower down the status of my client in the eyes of general people and bankers and for which my client instructed me to take the appropriate action either Civil or Criminal in the Court of Law against your client."

(9) It is in the aforementioned situation, the respondents presented the cheque for the third time before the bank on 11.12.2003 which having been dishonoured, another notice was sent and served on 17.12.2003. The cheque was dishonoured for the third time also.

(10) Indisputably, as no payment was received from the appellant pursuant to the said notice, a complaint petition was filed on 23.1.2004. Upon receipt of summons, appellants moved the High Court under Section 482 of the Code of Criminal Procedure which, as noticed hereinbefore, by reason of the impugned judgment has been dismissed.

(11) Mrs.Desai, learned counsel appearing on behalf of the appellants raised the following contentions before us in support of this appeal;

(i) Having regard to the provisions contained in Section 138 of the Negotiable Instruments Act and in particular the proviso appended thereto, the cheque could not have been presented for the third time;

(ii) The complainant respondent having suppressed the fact of issuance of earlier notices, no order taking cognizance of the offence under Section 138 of the Negotiable Instruments Act should have been passed;

(iii) The High Court failed to take into consideration that the cheque having been deposited after three months and three notices having been issued one after the other, no cause of action survived, as earlier, two notices for presenting the cheque before the banker had been issued which had already been dishonoured.

(12) Strong reliance has been placed by Mrs. Desai in this behalf on ***Sadanand Bhadran*** **v**. ***Madhavan Sunil Kumar*** [1998 6 SCC 514], ***Prem Chand Vijay Kumar*** **v.** ***Yashpal Singh*** [2005 4 SCC 417] and ***Krishna Exports*** **v.** ***Raju Das*** [2004 13 SCC 498].

(13) Learned counsel appearing on behalf of the respondent, on the other hand, contented;

(i) The cheque having been presented within a period of six months, the order taking cognizance was not barred in terms of the proviso appended to Section 138 of the Negotiable Instruments Act;

(ii) The first notice having not been served and the appellants themselves having called upon the respondents to withdraw the second notice, cannot now be permitted to urge that the deposit of the cheque for the third time and issuance of third notice was illegal and without jurisdiction.

(14) The Negotiable Instruments Act, 1881 was enacted to define and amend the law relating to Promissory Notes, Bills of Exchange and Cheques.

(15) Chapter XVII of the Act provides for penalties in case of dishonour of cheques for insufficiency of funds in the accounts of the drawer thereof.

(16) Indisputably, Chapter XVII, which was inserted by the Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 (66 of 1988) and came into force on 1.4.1989, was incorporated to "enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or for the reason that it exceeds the arrangements made by the drawer, with adequate safeguards to prevent harassment of honest drawers."

[In the aforementioned backdrop, the court noticed the provisions of Sections 138, 139 and 142 of the Act : *Ed.*]

(18) Indisputably, by reason of Section 138 of the Act a penal provision has been laid down that the issuer of any cheque would commit an offence if the cheque when presented is dishonoured.

(19) For the said purpose a legal fiction was created. The proviso appended to the said provision, however, restricts the application of the main provision by laying down the

conditions which are required to be complied with before any order taking cognizance can be passed which are: (i) that the cheque must be presented within a period of six months from the date on which it is drawn; (ii) on the cheque being returned un-paid by the banker, a notice has to be issued within thirty days from the date of receipt of information by him from the bank regarding the cheque being unpaid; (iii) in the event, the drawer of the cheque fails to make payment of the said amount of money to be paid within 15 days from the receipt thereof, a complaint petition can be filed within the period prescribed in terms of Section 142 thereof.

(20) The question which arises for our consideration is as to whether the aforementioned legal requirements have been complied with by the respondent herein so as to enable him to maintain the complaint petition or not.

(21) The cheque is dated 22.6.2003. In terms of the afore-mentioned provisions it could have been presented within six months thereafter, namely, by 22.12.2003. Indisputably, the cheque was presented for the third time on 11.12.2003 i.e. within the prescribed period.

(22) What is prohibited is presentation of the cheque within the afore-mentioned period and not the number of times it is presented. It is, therefore, immaterial whether for one reason or the other the complainant had to present the cheque for the third time or not.

(23) We may now consider the submission of Ms.Desai, learned counsel as regards the issuance of successive notices.

(24) The first notice purported to have been issued by the complainant-respondent on 8.7.2003 is not on record. Admittedly appellants have not received the same.

(25) As regards notice dated 9.9.2003 which is said to be the second notice, it is evident that the same had not been served upon the appellants having been returned. If that be so, the presentation of the cheque for the second time and issuance of the second notice in our opinion would not be invalid.

(26) We have, however, noticed hereinbefore that the appellant No.2 through his Advocate raised the question as regards the validity and/or legality thereof as the said notice was addressed in stead and place of S.L.Constructions and was issued in the name of and served on S.L.Structures and Engineers.

(27) Appellants in our opinion having themselves raised the contention with regard to the legality and validity of the said notice and, furthermore, having called upon the complainant-respondent to withdraw the same, no exception can be taken to the step taken Abundanti Cautela by the complainant-respondent to present the cheque for the third time and issue another notice on 17.12.2003.

(28) ***Sadanandan Bhadran*** whereupon strong reliance has been placed by Mrs.Desai, learned counsel lays down the law in the following terms:

> "7. Besides the language of Sections 138 and 142 which clearly postulates only one cause of action, there are other formidable impediments which negate the concept of successive causes of action. One of them is that for dishonour of one cheque, there can be only one offence and such offence is committed by the drawer immediately on his failure to make the payment within fifteen days of the receipt of the notice served in accordance with clause (b) of the proviso to Section 138. That necessarily means that for similar failure after service of fresh notice on subsequent dishonour, the drawer cannot be liable for any offence nor can the first offence be

> treated as *non est* so as to give the payee a right to file a complaint treating the second offence as the first one. At that stage, it will not be a question of waiver of the right of the payee to prosecute the drawer but of absolution of the drawer of an offence, which stands already committed by him and which cannot be committed by him again."

It was further held:

> "8. The other impediment to the acceptance of the concept of successive causes of action is that it will make the period of limitation under clause(c) of Section 142 otiose, for, a payee who failed to file his complaint within one month and thereby forfeited his right to prosecute the drawer, can circumvent the above limitative clause by filing a complaint on the basis of a fresh presentation of the cheque and its dishonour. Since in the interpretation of statutes, the court always presumes that the legislature inserted every part thereof for a purpose and the legislative intention is that every part should have effect, the above conclusion cannot be drawn for that will make the provision for limiting the period of making the complaint nugatory."

(29) Indisputably, the term cause of action would mean each of the facts required to be proved. Successive issuance of notices having been made under Section 138 of the Act as laid down under the proviso appended thereto, the respondent merely made all attempts to comply with the legal requirements.

(30) In this case, as indicated hereinbefore, the first notice having not been served and the second notice having been withdrawn in terms of the reply issued by the learned advocate for the appellants themselves, the complainant cannot be said to have committed any illegality in presenting the cheque for the third time and issuing the third notice upon the defaulter.

(31) We need not refer to the other decisions relied upon by Mrs.Desai, learned counsel as the same had merely followed the dicta laid down in ***Sadanandan Bhadran***.

(32) As the issuance of cheque, non-payment thereof on presentation, issuance of a valid notice calling upon the drawer of the cheque to pay the amount in question and the appellants' failure to pay to the complainant the amount in question within a period of 15 days from the date of receipt of a copy of the said notice upon them, a cause of action arose for filing a complaint petition, in our opinion, the High Court cannot be said to have committed any error in passing the impugned judgment.

(33) In view of the findings aforementioned we have no hesitation to hold that the cause of action for filing a complaint arose only once and not more than once as contented by by Mrs. Desai, learned counsel.

(34) It may be true that the High Court has not elaborately dealt with this aspect of the matter, but the same would not mean that we should remit the matter back to the High Court for consideration of the matter afresh as we have gone into the question raised by the parties ourselves.

(35) For the reasons aforementioned, there is no merit in this appeal and it is dismissed accordingly with costs. Counsel's fee quantified at Rs. 10,000/-.

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PART – B : BANKING

Sajjan Bank (Private) Ltd. v. *Reserve Bank of India*

AIR 1961 Mad. 8

RAMACHANDRA IYER, J. – The Sajjan Bank (Private) Ltd., which is carrying on business at Alandur, originated from Sajjan and Co. Ltd., which was incorporated in November 1944 with the main object of carrying on money-lending business. In May 1946, the company was converted into a banking company and in November of that year its name was changed into Sajjan Bank (Private) Ltd. All its shares are held by its three directors who are said to be closely related. The Banking Companies Act, 1949, referred to hereafter as the Act, came into force on 16.3.1949.

Section 22 of the Act provided amongst other things that every banking company in existence at the commencement of this Act should before the expiry of six months from such commencement and, every other company before commencing banking business in India, apply in writing to the Reserve Bank for a licence under the section to carry on banking business. The section further provided that the Banking Companies in existence at the commencement of the Act could continue to carry on their banking business till final orders were passed on their application for licence.

3. On 14.9.1949, the petitioner bank applied under S. 22 of the Act, to the respondent for a licence to carry on banking business. The Officers of the Reserve Bank inspected the petitioner bank under S. 22 of the Act in July 1952. A report of that inspection was prepared on 11.10.1952. The inspection appears to have revealed the existence of certain defects in the working of the bank. The Reserve Bank therefore decided to keep in abeyance the consideration of the question of issuing a licence evidently with a view to watch the progress of the bank in eradicating the defects pointed out by the inspection report.

The defects noticed were the subject matter of subsequent correspondence between the petitioner and the Reserve Bank. A fresh inspection of the petitioner Bank was carried out in September 1956 under S. 35 of the Act. That also revealed certain defects. The respondent was evidently not satisfied that the affairs of the petitioner Bank were being conducted in the interests of the depositors. The question of the grant of licence was taken up. The petitioner was directed to show cause against the refusal of the licence. The bank was also furnished with a copy of the inspection report.

After considering the representation of the petitioner, the respondent by its letter dated 18.3.1957, declined to grant the licence to the petitioner to carry on banking business in the terms of the first proviso to sub-section (2) of S. 22 of the Act. Aggrieved by that, the petitioner has moved this court for the issue of a writ of certiorari to quash the order of the respondent refusing to grant a licence to carry on business as a banking company.

5. Mr. Rajah Iyer, the learned advocate for the petitioner, raised before me three contentions: (1) That S. 22 of the Banking Companies Act was unconstitutional in so far as it proceeded to restrict the fundamental right of the petitioner to carry on its business, namely, the banking business; (2) even if the provisions of S. 22 of the Act be held to be in

accordance with the Constitution, the action of the respondent was arbitrary; (3) In any event the procedure adopted by the respondent was illegal and in that after an inspection under S. 35, it could only proceed to act under S. 35(4) and not refuse the licence altogether.

7. The Reserve Bank of India came into existence on 1.4.1935. It is a central bank combining in its functions the regulation of both the credit and the currency of the country. Prior to its formation the responsibility for the currency was vested in the Central Government. The Imperial Bank of India performed the banking functions. This dichotomy between currency and credit was found to be a weakness in the Indian monetary system by the Royal Commission of Indian Currency and Finance in 1926. The Commission recommended the establishment of a Central Bank by charter on certain lines which experience had proved to be sound. It is said that the structure of the Bank was modelled very largely on the Bank of England.

It is a non-political statutory body, the general superintendence and management of the bank's affairs being vested in the Central Board of Directors. For each of the four regional areas, Bombay, Calcutta, Madras and New Delhi, there is a local Board functioning. The function of the local Boards is to advise the Central Board on such matters as may be referred to them or perform such duties as the Central Board may validly delegate to them. The preamble to the Reserve Bank Act states that the bank was constituted to regulate the issue of bank notes, to keep up reserves with a view to secure monetary stability in India and generally to operate currency and credit system of the country to its advantage.

The main function, therefore, of the Reserve Bank is to regulate the monetary system of the country so as to ensure the maintenance of economic stability and assist in its growth. The Bank has got the sole right to issue currency notes and it also acts as the Banker to the Government. It also acts as a banker to the various commercial Banks and other financial institutions and it has got various rights and duties prescribed in Chapter II of the Reserve Bank Act. For the performance of its duties in regard to the regulation of the credit of the country, the Reserve Bank is invested with powers of control of the bank rate, open market transactions etc.

The Reserve Bank's responsibilities include the development of an adequate and sound banking system not only for trade and commerce but also for the agricultural industry. The Reserve Bank is, therefore, occupying a position of considerable importance in the economic development of the country and its monetary system.

8. Originally, joint stock banks were governed in respect of their incorporation, organisation and management by the Indian Companies Act of 1913, which was common to banking as well as non-banking companies. In 1936, certain new provisions were introduced to the Indian Companies Act of 1913, in regard to the banking companies. In 1949, the Banking Companies Act was passed to consolidate and amend the law relating to the Banking Companies. The necessity for the legislation was for safeguarding the interests of the depositors, shareholders and of the economic interests of the country in particular. Under S. 5(b) of the Act, the term "banking" has been defined as

> "accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise."

This definition follows the accepted legal concept of the word "banking." The essence of a banking business is, therefore, receiving money on current account for deposit from the public repayable on demand and withdrawable by cheque, draft or otherwise.

9. An ordinary moneylender who does not accept moneys on terms enabling a depositor to draw cheques upon him would not, therefore, be a bank or banker properly so called. The provisions of the Act would, therefore, apply only to the limited class of cases where the bank or banker allows the withdrawal of money by the issue of cheques. A banking company has been defined to be a company that transacts the business of banking in India. Section 6 provides that in addition to banking business banking company may engage themselves in various allied businesses which are more or less incidental to or essential for the carrying on of the banking business.

Section 13 prescribes the minimum standards as to paid up capital and aggregate reserves. Sections 12 and 12(a) prevent the control of companies by a few persons to the detriment of a majority of shareholders and permits the Reserve Bank of India to require a banking company to call for a general meeting of the shareholders of the company, to elect fresh directors in accordance with the voting rights. Section 14 prohibits the creation of charges on unpaid capital. Sections 17 and 18 provide for minimum reserve funds and cash reserve. Section 20 prohibits loans on security of the company's shares and unsecured loans to its directors to firms or private companies in which they are interested. Section 21 gives power to the Reserve Bank of India to control its advances. Section 22 prescribes a system of licensing of banks, the power of licensing being vested in the Reserve Bank of India. I shall advert to that section in greater detail presently.

Section 23 places restrictions on the opening of new places of business or change of existing place of business. Sections 24 and 25 require the maintenance of sufficient liquid assets. Section 26 obliges a bank to report to the Reserve Bank every year about unclaimed deposits. Sections 27 and 28 invest a power in the Reserve Bank to call for information and to punish them if it so decides. Sections 35 and 36 confer power in the Reserve Bank of India to call for periodical returns and inspection of books of accounts and empower the Central Government to take action against banks conducting business in a manner detrimental to the interests of the depositors. Section 35-A gives powers to the Reserve Bank of India to give directions to the banking companies in general, or to any banking company in particular, in the national interest or to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company or to secure proper management thereof.

There are also other provisions relating to the management, restriction on the holding of shares and in regard to the winding up of banking companies. Thus the legislation is a comprehensive measure, covering the establishment, the working and the liquidation of the banks. The Reserve Bank of India is substantially invested with the power of regulation of the banking companies. In this country there are various types of banks ranging from the

village moneylender to a big commercial bank. It was found necessary in the interests of the public that there should be a regulation of the banking system. Section 22 introduces a complete system of licensing of banks by the Reserve Bank. Shortly stated the grant of a licence in the case of banks incorporated in India is dependent upon the maintenance of a satisfactory financial condition. In the case of foreign banks there is a further condition imposed that the country of their origin could not discriminate in any way against the banks registered in India Sub-sections (1) and (2) provide for the necessity of obtaining a licence by a banking company and the time at which the licence is to be applied. The proviso to sub-section (2) authorises an existing banking company to continue to function until it is granted a licence or refused a licence. The conditions for granting the licence by the Reserve Bank are set out in sub-section (3). The section also provides for the cancellation by the Reserve Bank of a licence granted by it. In that case, the concerned bank is given a right of appeal. Similar enactments exist in the laws of certain foreign countries like America.

10. Mr. Rajah Aiyar contends that the provisions of S. 22(1) are unconstitutional as being in restraint of trade or business as in effect an arbitrary power is vested in the Reserve Bank of India to grant or refuse a licence, which according to him is really a permit for the doing of the business to be granted by the body. He, therefore, contended that the provisions of S. 22(1) of the Act are unconstitutional and invalid. In support of that contention he relied upon the principle stated in ***Namazi* v. *Dy. Custodian of Evacuee Property, Madras*** [AIR 1951 Mad 930]. That was a case where a disposition of property by an intending evacuee was made subject to permission by the Custodian of Evacuee Property. No rules were framed under the Act for his guidance. The nature of the enactment was that the custodian who was a mere officer of the Government could arbitrarily refuse to approve of a transfer by an intending evacuee. My Lord, the Chief Justice, observed:

> "It may be said that the Custodian would not ordinarily refuse to approve any transfer unless for proper grounds. But surely that would be gambling on the reasonableness of the Custodian. As the section stands, there is nothing to prevent the Custodian from most unreasonably refusing to approve of any transfer by intending evacuee."

It was held that while a permit system would be unconstitutional in so far as it related to the exercise of fundamental rights, it was well settled that a system of licensing, which had for its object the regulation of trades, would not be repugnant to Art. 19(1)(g) of the Constitution. That decision is also valuable for ascertaining whether in a particular case what was intended was only a licence for the regulation of trade or a permit as a condition precedent to the exercise of a business by an arbitrary power in the authority to grant or refuse a licence. The existence of rules for the guidance of the authority, the insistence of reasons for the refusal of a licence, provision for a right of appeal, the nature of the enquiry before the refusal of a licence being judicial in an enquiry were held to constitute that what was prescribed by a statute was only a regulation of trade by the issue of licence and not the insistence of a permit.

The question then is whether the provisions of S. 22(1) of the Banking Companies Act which require a licence for carrying on business by a banking company should be held a system of enabling the doing of such a business by the issue of permits or whether only a

licence intended to regulate the business of banking. There is no doubt that the Banking Companies Act was passed in the interests of the public after detailed enquiry by a Committee and after consideration of its reports. As I pointed out already the Committee itself recommended a system of licensing of all banking companies. Even the foreign banking experts were not averse to the proposal. The licensing itself is vested in a statutory authority, which is itself a Central Banking institution concerned both with the currency and credit operations in the country.

The Reserve Bank of India was established with a view to fostering the banking business and not for impeding the growth of such business. The powers vested in it under S. 22 are not one invested with a mere officer of the Bank. The standards for the exercise of the power have been laid down in S. 22 itself. The Reserve Bank is a non-political body concerned with the finances of the country. When a power is given to such a body under a statute which prescribes the regulations of a Banking Company, it can be assumed that such power would be exercised so that genuine banking concerns could be allowed to function as a bank, while institutions masquerading as banks or those run on unsound lines or which would affect the interests of the public could be weeded out.

The power given is regulated by the statute and being entrusted to a statutory body which is itself regulating the credit of the country the nature of the power, its exercise after the investigation prescribed by the statute invests it with a quasi-judicial character. Such a power cannot be said to be an arbitrary one. It is a mere licence granted as a matter of course to all genuine banking institutions run on sound lines as the judicial character of power would indicate. It cannot be held to be a permit.

14. It must also be noticed that the refusal of the licence under S. 22 of the Act does not mean a stoppage of business. I have already referred to the fact that the essence of banking is the opening of current account and the enabling of the constituent to draw by cheques. It follows that the refusal of a licence would only entail a loss of that type of business and it would be perfectly open to the petitioner to carry on business as moneylenders the only disability or restriction being that it cannot have transactions under which the constituents could draw cheques on him.

17. This leads us to the next question, namely, whether the respondent in this case has arbitrarily exercised the power, as is complained by the petitioner. There is no complaint in this case that sufficient opportunity was not given. But what is contended on behalf of the petitioner is that further opportunities should have been given to rectify the errors rather than refuse the licence. It is also contended that the petitioner had complied with all the directions, which the respondent gave from time to time and that there was really no default on its part. Mr. Rajah Iyer also contended that while the respondent was giving directions and the petitioner was complying with the same as and when given, the former had made up its mind not to issue the licence and that it did not bring to bear on the decision of the question of a judicial attitude.

The first inspection by the respondent of the petitioner was in 1952 under the provisions of S. 22. That revealed that the petitioner bank was not conducted on sound banking lines. The report dated 11.10.1952 pointed out fundamental errors in the accounts as also non-compliance with the provisions of the Act. The Reserve Bank very properly kept in abeyance

the decision of the question of the grant of licence. But the Bank being one that came into existence before the Act, it could continue its banking business till the licence was granted or refused. It was, therefore, necessary that some kind of control should be exercised over the bank pending decision on the issue of the licence. They, therefore, proceeded to give periodical instructions in regard to the conduct of the bank. I have said that the first inspection revealed defects in the method of keeping accounts and contravention of certain provisions of the Act.

Correspondence that ensued was in regard to both the matters. It was not till 1955 that the defects pointed out were sought to be explained away or remedied. This, therefore, entailed a further inspection, undertaken by the Reserve Bank under S. 35 of the Banking Companies Act. A report was duly submitted to the local board of the Bank, who were satisfied that the proposal to refuse the licence was proper in the circumstances. As pointed out in the report of the Reserve Bank on more than one occasion, the bank was not able to effectuate any material improvement in the pattern of its working. It was not able to attract sufficient deposits from the public. As a private limited company to start with it was converted into a banking company evidently to circumvent the provisions of the Madras Pawn Brokers Act of 1943.

The paid up capital was only Rs. 50,000. Its reserves were found to be poor and the establishment charges had absorbed more than 50 per cent of the gross income. The Reserve Bank gave more than one opportunity to the petitioner to show cause against the refusal of licence. In the report placed before the Central Committee we find a comparative statement of the undesirable features noticed in the inspection reports with the corresponding representation of the bank and the comments of the bank. It was only after a careful consideration of all the matters that the Reserve Bank came to the conclusion that the continuance of the bank would be likely to prove detrimental to the interests of prospective depositors and that the petitioner was not entitled to a licence.

The respondent did not take any hasty action. The progress and working of the bank was closely watched for more than 4 years and every opportunity was given to the bank to justify its claim as a sound banking concern. The learned Advocate General explained that the delay in the disposal of the application by the respondent was due to their anxiety not to precipitate a crisis which a quick decision to refuse licence might occasion and which might further lead to undesirable results. Far from the action of the Reserve Bank being arbitrary, I am satisfied that it has given the utmost consideration to the petitioner's case

19. I am, therefore, of the opinion that the action of the Reserve Bank in refusing to grant the licence to the petitioner is within its jurisdiction, and such jurisdiction has been properly exercised in the case, and that there is no case for the issue of a writ under Art. 226 of the Constitution. This petition is dismissed with costs.

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PART – C : INSURANCE

Pink v. *Fleming*

(1890) 25 Q.B.D. 396

LORD FISHER, J. - It is well settled that by the law of England there is a distinction in this respect between cases of marine insurance and those of other liabilities. In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages on an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or *causa causans*; but in cases of marine insurance only the *causa proxima* can be regarded. This question can only arise where there is a succession of causes, which must have existed in order to produce the result. Where that is the case, according to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them. Here there was such a succession of causes. First, there was the collision. Without that no doubt the loss would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken to a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences. If it had not been for the repairs, and for the removal of the cargo for the purposes of such repairs, and for the consequent delay and handling of the fruit, the loss would not have happened. The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs, it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause may be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do.

For these reasons I think that the judgment of Mathew, J., was right. The case of ***Taylor* v. *Dunbar*** [LR 4 C.P. 206], seems to me to have been decided upon substantially the same view as that which I have endeavoured in somewhat different terms to state, and it appears to me to be really an express authority in favour of our decision. With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them.

LINDLEY, J. - It appears to me that the judgment of Mathew, J., was correct. It has long been the settled rule of English law with regard to marine insurance that only the *causa proxima* or immediate cause of the loss must be regarded. The rule is well known, and people must be taken to have contracted on that footing. In principle the case appears to me to be governed by the decision in ***Taylor* v. *Dunbar***. The evidence shows that the damage to the fruit was due to the joint operation of the handling and the delay.

Mithoolal Nayak v. *Life Insurance Corporation of India*

AIR 1962 SC 814

S.K. DAS, J. - The appellant is Mithoolal Nayak, who took an assignment on 18-10-1945 of a life insurance policy on the life of one Mahajan Deolal for a sum of Rs 25,000 in circumstances that we shall presently state. Mahajan Deolal died on 12-11-1946. Thereafter, the appellant made a demand against the respondent Company for a sum of Rs 26,000 and odd on the basis of the life insurance policy, which had been assigned, to him. This claim or demand of the appellant was repudiated by the respondent Company by a letter dated 10-10-1947, which in substance stated that the insured Mahajan Deolal had been guilty of deliberate misstatements and fraudulent suppression of material information in answers to questions in the proposal form and the personal statement, which formed the basis of the contract between the insurer and the insured. On the repudiation of his claim, the appellant brought the suit out of which this appeal has arisen. The suit was originally instituted against the Oriental Government Security Life Assurance Co. Ltd., Bombay, which issued the policy in favour of Mahajan Deolal on 13-3-1945. Later, on the passing of the Life Insurance Corporation Act, 1956, there was a statutory transfer of the assets and liabilities of the controlled (life) business of all insurance companies and insurers operating in India to a Corporation known as the Life Insurance Corporation of India. By an order of this Court made on 16-2-1960 the said Corporation was substituted in place of the original respondent. For brevity and convenience we shall ignore the distinction between the original respondent and the said Corporation and refer to the respondent in this judgment as the respondent Company. The suit was decreed by the learned Additional District Judge of Jabalpur by his judgment dated 7-5-1949. The respondent Company then preferred an appeal to the High Court of Madhya Pradesh. This appeal was heard by a Division Bench of the said High Court and by a judgment dated 28-8-1956, the appeal was allowed and the suit was dismissed with costs.

2. We now proceed to state some of the relevant facts relating to the appeal and the contentions urged on behalf of the appellant. Mahajan Deolal was a resident of Village Singhpur, Tahsil Narsinghpur. It appears that he was a small landholder and possessed several acres of land. Sometime in December 1942, Mahajan Deolal submitted a proposal through one Rahatullah Khan, an agent of the respondent Company at Narsinghpur, for the insurance of his life with the respondent Company for a sum of Rs 10,000 only. Mahajan Deolal's age at that time was about 45 as stated by him. In the proposal form that was submitted to the respondent Company, Mahajan Deolal mentioned the name of one Motilal Nayak, by profession a doctor, as a personal friend who best knew the state of the health and habits etc. of the insured. This Motilal Nayak, be it noted, is a brother of the appellant, the evidence in the record showing that the two brothers lived together in the same house. When Mahajan Deolal made the proposal for insurance of his life in December 1942, a doctor named Dr D.D. Desai examined him. This doctor submitted two reports about Mahajan Deolal: one report, it appears, was submitted with the proposal form through the agent of the respondent Company; another report was sent in a confidential cover along with a letter from the doctor. In this letter the doctor explained why he was submitting two medical reports. In substance he said that the report submitted with the proposal form at the instance of the agent,

Rahatullah Khan, was not a correct report and the correct report was the one that he enclosed in the confidential cover. In that report Dr Desai said that Mahajan Deolal was anaemic, looked about 55 years old, had a dilated heart and his right lung showed indications of an old attack of pneumonia or pleurisy. The doctor further said that the general health of Mahajan Deolal was very much run down and he was a total physical wreck. The doctor opined that Mahajan Deolal's life was an uninsurable life. It appears that nothing came out of the proposal made by Mahajan Deolal for the insurance of his life in December 1942. The evidence of the Inspector of the respondent Company shows that on receipt of Dr Desai's reports, the respondent Company directed that Mahajan Deolal should be further examined by the Civil Surgeon, Hoshangabad and District Medical Officer, Railways at Jabalpur. Mahajan Deolal could not, however, be examined by the two doctors aforesaid and according to the rules of the respondent Company the proposal lapsed on the expiry of six months for want of completion of the medical examination as required by the respondent Company. Then, on 16-7-1944, a second proposal was made through the same agent of the respondent Company for the insurance of the life of Mahajan Deolal, this time for a sum of Rs 25,000. The Inspector of the respondent Company said in his evidence that this second proposal was made at the instance of the same agent, Rahatullah Khan, inasmuch as the proposal of 1942 had not been rejected but had only lapsed. It appears that at the time of the first proposal in 1942 Mahajan Deolal had paid a sum of Rs 571 and odd towards the first premium due in case the proposal was accepted. In the personal statement accompanying the second proposal of 16-7-1944, it was stated that an earlier proposal for insuring the life of Mahajan Deolal was pending with the respondent Company. Now, in the proposal form there was a question to the following effect:

> "Have you within the past five years consulted any medical man for any ailment, not necessarily confining you to your house? If so, give details and state names and addresses of medical men consulted."

The answer given to the question was - "No". This answer, according to the case of the respondent, was false and deliberately false, because, according to the evidence of one Dr P.N. Lakshmanan, Consulting Physician at Jabalpur, Mahajan Deolal was examined and treated by the said doctor between the dates 7-9-1943, and 6-10-1943, when the doctor found that Mahajan Deolal was suffering from anaemia, oedema of the feet, diarrhoea and panting on exertion. We shall advert in greater detail to the evidence of Dr Lakshmanan at a later stage. In his personal statement accompanying the second proposal Mahajan Deolal answered in the negative Question 12(*b*), the question being as to when he was last under medical treatment and for what ailment and how long. In the same personal statement with regard to questions, for example, Question 5(*a*), 5(*b*) etc., as to whether he suffered from shortness of breath, anaemia, and asthma etc., Mahajan Deolal gave negative answers. The contention on behalf of the respondent Company was that these answers in the personal statement were also deliberately false and constituted a fraudulent suppression of material particulars relating to the health of the insured. With regard to the second proposal and the personal statement accompanying it, Dr Motilal Nayak, brother of the appellant, gave a friend's report, in which he said that Mahajan Pedal's health was good and that he had never heard that Mahajan Deolal suffered from any illness. It is worthy of note here that Dr Motilal Nayak himself took

Mahajan Deolal to Dr Lakshmanan for treatment at Jabalpur in September-October, 1943. On receipt of the second proposal in July 1944, Mahajan Deolal was examined by Dr Kapadia, who was the District Medical Officer of the Railways at Jabalpur. Dr Kapadia reported that Mahajan Deolal was a healthy man and looked about 52 to 54 years old. He recommended that Mahajan Deolal might be given a policy for fourteen years. In his report Dr Kapadia noted that Mahajan Deolal had stated that he had suffered from pneumonia four or five years ago, and that he had also cholera some years ago. No mention, however, was made of anaemia, asthma, shortness of breath etc. On 29-12-1944 Mahajan Deolal, made a further declaration of his good health and so also on 12-2-1945. On 13-3-1945, the respondent Company issued the policy. It contained the usual terms of such life insurance policies, one of which was that in case it would appear that any untrue or incorrect averment had been made in the proposal form or personal statement, the policy would be void. The first premium due on the policy was taken from the amount that was already in deposit with the respondent Company in connection with the proposal made in 1942. Then, on 22-5-1945, Mahajan Deolal wrote a letter to the respondent Company in which he said that his financial condition had become suddenly worse and that he would not be able to pay the premium for the policy. He requested that the policy be cancelled. In the meantime the premium for 1945 not having been paid, the policy lapsed. Then, on 28-10-1945 Mahajan Deolal made a request for revival of the policy, but a few days before that, namely on 18-10-1945, the policy was assigned in favour of the appellant, by an endorsement made on the policy itself. This assignment was duly registered by the respondent Company by means of its letter dated 1-11-1945 in which the respondent Company said that it accepted the assignment without expressing any opinion as to its validity or effect.

The respondent Company also made an enquiry from the appellant as to whether the latter had any insurable interest in the life of the insured and what consideration had passed from him to the insured. To this the appellant replied that he had no insurable interest in the life of Mahajan Deolal, except that the latter was a friend and he (the appellant) had purchased the policy for a sum of Rs 427.12 n.p. being the premium paid by him so far, because Mahajan Deolal did not wish to continue the policy. On his request for a revival of the policy Mahajan Deolal was again medically examined, this time by one Dr Belapurkar. Later on 25-2-1946 he was examined by Dr Clarke. The policy was then revived on payment of all arrears of premium, these arrears having been paid by the present appellant. On receipt of the revival fee, the policy appears to have been revived some time in July 1946. We have already stated that Mahajan Deolal died in November, 1946. The certificate of Dr Clarke, who was the medical attendant at the time when Mahajan Deolal died, showed that the primary cause of death of Mahajan Deolal was malaria followed by severe type of diarrhoea; the secondary cause was anaemia, chronic bronchitis and enlargement of liver. In the certificate that Dr Clarke gave there was mention of certain other medical practitioners who had attended Mahajan Deolal at the time of his death. One of such medical practitioners mentioned in the certificate was Dr Lakshmanan. On receipt of this certificate the respondent Company got into touch with Dr Lakshmanan and discovered from him that Mahajan Deolal had been treated in September-October 1943 by Dr Lakshmanan for ailments which, according to the doctor, were of a serious nature.

3. Several issues were tried between the parties in the trial court. But the four questions which were argued in the High Court and on which the fate of the appeal depends were these:

(*1*) Whether the policy was vitiated by fraudulent suppression of material facts by Mahajan Deolal?

(*2*) Whether the present appellant had no insurable interest in the life of the insured, and if so, can he sue on the policy?

(*3*) Whether the respondent Company had issued the policy with full knowledge of the facts relating to the health of the insured and if so, is it estopped from contesting the validity of the policy? and

(*4*) Whether in any event the appellant is entitled to refund of the money he had paid to the respondent Company?

5. So far as the first question is concerned, the learned trial Judge found that though Mahajan Deolal had given a negative answer to Question 13 in the proposal form and to Questions 5(*a*), 5(*b*), 5(*f*) and 12(*b*) in the personal statement, these answers though not strictly accurate, furnished no grounds for repudiating the claim of the appellant by the respondent Company, inasmuch as Section 45 of the Insurance Act, 1938 (Act 4 of 1938) applied and the answers did not amount to a fraudulent suppression of material facts by the policy-holder within the meaning of that section. The learned trial Judge found that the ailments for which Dr Lakshmanan treated Mahajan Deolal in September-October 1943 were of a casual or trivial nature and the failure of the policy-holder to disclose those ailments did not attract the second part of Section 45 of the Insurance Act. The High Court came to a contrary conclusion and held that even applying Section 45 of the Insurance Act, the policy-holder was guilty of a fraudulent suppression of material facts relating to his health within the meaning of that section and the respondent Company was entitled to avoid the contract on that ground.

7. We shall presently consider the evidence, but it may be advantageous to read first Section 45 of the Insurance Act, 1938, as it stood at the relevant time. The section, so far as it is relevant for our purpose, is in these terms:

> "No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose…."

It would be noticed that the operating part of Section 45 states in effect that no policy of life insurance effected after the coming into force of the Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the

ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false; the second part of the section is in the nature of a proviso which creates an exception. It says in effect that if the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose, then the insurer can call in question the policy effected as a result of such inaccurate or false statement. In the case before us the policy was issued on 13-3-1945 and it was to come into effect from 15-1-1945. The amount insured was payable after 15-1-1968 or at the death of the insured, if earlier. The respondent Company repudiated the claim by its letter dated 10-10-1947. Obviously, therefore, two years had expired from the date on which the policy was affected. We are clearly of the opinion that Section 45 of the Insurance Act applies in the present case in view of the clear terms in which the section is worded, though learned counsel for the respondent Company sought, at one stage, to argue that the revival of the policy some time in July 1946 constituted in law a new contract between the parties and if two years were to be counted from July, 1946, then the period of two years had not expired from the date of the revival. Whether the revival of a lapsed policy constitutes a new contract or not for other purposes, it is clear from the wording of the operative part of Section 45 that the period of two years for the purpose of the section has to be calculated from the date on which the policy was originally effected; in the present case this can only mean the date on which the policy (Ex. P-2) was effected. From that date a period of two years had clearly expired when the respondent Company repudiated the claim. As we think that Section 45 of the Insurance Act applies in the present case, we are relieved of the task of examining the legal position that would follow as a result of inaccurate statements made by the insured in the proposal form or the personal statement etc. in a case where Section 45 does not apply and where the averments made in the proposal form and in the personal statement are made the basis of the contract.

8. The three conditions for the application of the second part of Section 45 are -

(*a*) the statement must be on a material matter or must suppress facts which it was material to disclose;

(*b*) the suppression must be fraudulently made by the policy-holder; and

(*c*) the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

The crucial question before us is whether these three conditions were fulfilled in the present case. We think that they were. We are unable to agree with the learned trial Judge that the ailments for which Mahajan Deolal was treated by Dr Lakshmanan in September-October 1943 were trivial or casual ailments. Nor do we think that Mahajan Deolal was likely to forget in July 1944 that he had been treated by Dr Lakshmanan for certain serious ailments only a few months before that date. This brings us to a consideration of the evidence of Dr Lakshmanan. That evidence is clear and unequivocal. Dr Lakshmanan says that Dr Motilal Nayak brought the patient to him at Jabalpur. We have already referred to the fact that Dr Motilal Nayak had himself made a false statement in his friend’s report dated 17-7-1944,

when he said that he had never heard that the insured had suffered from any illness. It is impossible to believe that Dr Motilal Nayak would not remember that he had himself taken the insured to Jabalpur for treatment by Dr Lakshmanan who was an experienced consulting physician. Dr Lakshmanan said that when he first examined Mahajan Deolal on 7-9-1943 he found that his condition was serious as a result of the impoverished condition of his blood, and that Mahajan Deolal was suffering from anaemia, oedema of the feet, diarrhoea and panting on exertion. The doctor asked for an examination of the blood. The pathological report supported the diagnosis that Mahajan Deolal was suffering from secondary anaemia meaning thereby that anaemia was due to lack of iron and malnutrition. Dr Lakshmanan further found that from the symptoms disclosed the disease was a major one. Mahajan Deolal had also cardiac asthma, which was a symptom of anaemia and due to dilatation of heart. Dr Lakshmanan saw the patient again on 9-9-1943, and then again on 16-9-1943. On 6-10-1943, Mahajan Deolal himself went to Dr Lakshmanan. On that date Dr Lakshmanan found that anaemia had very greatly disappeared. In cross-examination Dr Lakshmanan admitted that the anaemia, dilatation of heart and cardiac asthma from which Mahajan Deolal was suffering constituted a passing phase that might disappear by treatment. He further admitted that he did not mention cardiac asthma in his letter addressed to the respondent Company. We have given our very earnest consideration to the evidence of Dr Lakshmanan and we are unable to hold that the ailments from which Mahajan Deolal was then suffering were either trivial or casual in nature. The ailments were serious though amenable to treatment. Mahajan Deolal's son gave evidence in the case and he said in his evidence that though Dr Lakshmanan prescribed some medicine, his father did not take it. He further said that his father was a strict vegetarian. This evidence was given by the son with regard to what the doctor had said that he prescribed fresh liver juice made at home according to his directions three times a day. He also prescribed iron sulphate in tablet form with plenty of water. The son further said that during his stay at Jabalpur his father felt weak, though he used to move about freely and was never confined to bed. The son tried to make it appear in his evidence that his father was suffering from nothing serious. Dr Lakshmanan said in his evidence that his fees for visiting a patient at Jabalpur were Rs 16 per visit. We agree with the High Court that if Mahajan Deolal was not suffering from any serious ailment, he would not have been taken by his physician, Dr Motilal Nayak, from his village to Jabalpur nor would he have consulted Dr Lakshmanan, a consulting physician of repute, for so many days on payment of Rs. 16 per visit. No doubt, Mahajan Deolal's son now tries to make light of the illness of his father, but Dr Lakshmanan's evidence shows clearly enough that in September-October 1943 Mahajan Deolal was suffering from a serious type of anaemia for which he was treated by Dr Lakshmanan. Mahajan Deolal could not have forgotten in July, 1944 that he was so treated only a few months earlier and furthermore, Mahajan Deolal must have known that it was material to disclose this fact to the respondent Company. In his answers to the questions put to him he not only failed to disclose what it was material for him to disclose, but he made a false statement to the effect that he had not been treated by any doctor for any such serious ailment as anaemia or shortness of breath or asthma. In other words, there was a deliberate suppression fraudulently made by Mahajan Deolal.

9. We may here dispose of the third question. Learned counsel for the appellant has argued before us that Mahajan Deolal was examined under the direction of the respondent

Company by as many as four doctors, namely, Dr Desai, Dr Kapadia, Dr Belapurkar and Dr Clarke. It is further pointed out that Mahajan Deolal had correctly disclosed that he had suffered previously from malaria, pneumonia and cholera. Dr Kapadia, it is pointed out, was specifically asked to examine Mahajan Deolal in view of the conflicting reports that Dr Desai had earlier submitted. On these facts, the argument has been that the respondent Company had full knowledge of all facts relevant to the state of health of Mahajan Deolal and having knowledge of the full facts, it was not open to the respondent Company to call the policy in question on the basis of the answers given by Mahajan Deolal in the proposal form and the personal statement, even though those answers were inaccurate. Learned counsel for the appellant has referred us to the Explanation to Section 19 of the Indian Contract Act in support of his argument. We are unable to accept this argument as correct. It is indeed true that Mahajan Deolal was examined by as many as four doctors. It is also true that the respondent Company had before it the conflicting reports of Dr Desai and it specially asked Dr Kapadia to examine Mahajan Deolal in view of the reports submitted by Dr Desai.

Yet, it must be pointed out that the respondent Company had no means of knowing that Mahajan Deolal had been treated for the serious ailment of secondary anaemia followed by dilatation of heart, etc., in September-October 1943 by Dr Lakshmanan. Nor can it be said that if the respondent Company had knowledge of those facts, they would not have made any difference. The principle underlying the Explanation to Section 19 of the Contract Act is that a false representation, whether fraudulent or innocent, is irrelevant if it has not induced the party to whom it is made to act upon it by entering into a contract. We do not think that that principle applies in the present case. The terms of the policy make it clear that the averments made as to the state of health of the insured in the proposal form and the personal statement were the basis of the contract between the parties, and the circumstance that Mahajan Deolal had taken pains to falsify or conceal that he had been treated for a serious ailment by Dr Lakshmanan only a few months before the policy was taken shows that the falsification or concealment had an important bearing in obtaining the other party's consent. A man who has so acted cannot afterwards turn round and say: "It could have made no difference if you had known the truth." In our opinion, no question of waiver arises in the circumstances of this case, nor can the appellant take advantage of the Explanation to Section 19 of the Indian Contract Act.

10. Our finding on the first question makes it unnecessary for us to decide the second question, namely, whether the present appellant merely gambled on the life of Mahajan Deolal when he took the assignment on 18-10-1945. The contention of the respondent Company was that the appellant had no insurable interest in the life of Mahajan Deolal and when he took the assignment of the policy on 18-10-1945 he was merely indulging in a gamble on Mahajan Deolal's life; the contract was, therefore, void by reason of Section 30 of the Indian Contract Act. On behalf of the appellant, however, the contention was that Section 38 of the Insurance Act provided a complete code for assignment and transfer of insurance policies and the assignment made in favour of the appellant by Mahajan Deolal was a valid assignment in accordance with the provisions of Section 38 aforesaid. The High Court, it appears, proceeded on the footing that from the very inception the policy was taken for the benefit of the appellant on the basis of a gamble on the life of Mahajan Deolal; it said that the

appellant and his brother, Dr Motilal Nayak, knew very well that Mahajan Deolal was not likely to live very long and when the policy was taken out in 1944, it was really for the benefit of the present appellant, who soon after took an assignment on payment of the premium already paid by Mahajan Deolal and such arrears of premium as were then outstanding. It is unnecessary for us to give our decision on these contentions; because if Mahajan Deolal was himself guilty of a fraudulent suppression of material facts on which the respondent Company was discharged from performing its part of the contract, the appellant who holds an assignment of the policy cannot stand on a better footing than Mahajan Deolal himself. It was argued before us that if the policy was valid in its inception, that is to say, if it was in fact effected for the use and benefit of Mahajan Deolal, who undoubtedly had an insurable interest in his own life, it could not afterwards be invalidated by assignment to a person who had no interest but who merely took it as a speculation. As we have stated earlier, on our conclusion on the first question, the appellant is clearly out of Court and cannot claim the benefit of a contract which had been entered into as a result of a fraudulent suppression of material facts by Mahajan Deolal.

11. This brings us to the last question, namely, whether the appellant is entitled to a refund of the money he had paid to the respondent Company. Here again one of the terms of the policy was that all moneys that had been paid in consequence of the policy would belong to the Company if the policy was vitiated by reason of a fraudulent suppression of material facts by the insured. We agree with the High Court that where the contract is bad on the ground of fraud, the party who has been guilty of fraud or a person who claims under him cannot ask for a refund of the money paid. It is a well-established principle that courts will not entertain an action for money had and received, where, in order to succeed, the plaintiff has to prove his own fraud. We are further in agreement with the High Court that in cases in which there is a stipulation that by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract, neither Section 65 nor Section 64 of the Indian Contract Act has any application.

12. For the reasons given above we have come to the conclusion that there is no merit in the appeal. The appeal is accordingly dismissed with costs.

* * * * *

Kasim Ali Bulbul v. *New India Assurance Co.*

AIR 1968 J & K 39

J.N. BHAT, J. – The plaintiff, Kasim Ali Bulbul, carries on business in wood carving and paper machine under the name and style of K.A. Bulbul in Lambert Lane, Residency Road, Srinagar. On 8th June 60 he got his stock-in-trade consisting of wood carving, paper machine, business furniture and two pieces of carpet contained in the shop insured with the defendant company for one year from 8th June 60 to 8th June 61 for a sum of Rs. 30,000.

A policy No. 155860356 was issued in his favour by the defendant company. The plaintiff's shop caught fire on the night between 4/5th February 1961 while he was asleep in Zadaibal. Next morning he came on the scene and found that the shop had been taken possession by the local officials of the defendant company and the police. It was sealed. The plaintiff gave tentative information of this fire to the defendant company. The plaintiff's books were seized by the police. The police inquired into the matter and declared the fire accidental. Later on a Surveyor was deputed by the defendant company who made a report. The loss that he sustained on this account was Rs. 27340.31.

2. The shop remained in possession of the defendant company when on the night of 3rd November 61 another fire broke out which destroyed the remaining articles in the shop. There were some un-insured goods of the value of Rs. 564.50. The total claim of the plaintiff thus comes to Rs. 27,904.81.

3. According to the plaintiff, on the basis of the insurance effected on his goods, the defendant company was liable to make good the loss to him, but did not do so. As the keys of the shop remained with the defendant upto 3rd November 61, the defendant was further liable for the loss of uninsured goods valuing Rs. 564.50. The plaintiff therefore claimed a decree for the above-mentioned amount, i.e., Rs. 27,904.81.

4. In defence the defendant company has taken a number of pleas. They are that the defendant has not been properly sued; the plaint is not properly verified and the suit is time-barred. All the benefits under the policy and the suit stand forfeited because (1) the claim is fraudulent; (2) A false declaration has been made in support of the claim; (3) the loss or damage was occasioned by the wilful act and connivance of the plaintiff; (4) the plaintiff has not complied with the terms and conditions of the policy; (5) the plaintiff is not entitled to any relief as the suit was not commenced within three months after the rejection of his claim by the defendant company; and (6) the plaintiff did not comply with condition 11 of the policy and did not submit any claim within the period of 15 days from the date of the alleged loss. Condition 11 is quoted in extenso in the written statement. The plaintiff was notified by letter dated 25-2-61 that as the claim was not submitted in accordance with this condition, his claim could not be entertained.

5. On facts the defendant did not deny the insurance of the articles of the plaintiff with the defendant company as alleged by the plaintiff. But the defendant alleged that this contract was entered into by the defendant on the basis of false representation and suppression of material facts by the plaintiff which vitiated the whole contract. It was admitted that the plaintiff informed the defendant company at Srinagar on 5.2.61 that his shop had been gutted

on the night between 4/5th February 61. On 5.2.61 the plaintiff was asked to submit his claim, account books, pass books and submit his claim form. He was reminded by another letter dated 16.2.61. But the plaintiff did not do anything. It is admitted that the defendant company locked the shop but the plaintiff's lock also was there. On 25.2.61, the defendant rejected the claim of the plaintiff. The plaintiff did not submit his account books, nor submit his claim in writing. The plaintiff replied the letter of the defendant of 25.2.61 that he could not ascertain the damages as the account books and other documents were lying with the police. By letter dated 28.2.61 the plaintiff was again referred to the letter of the defendant dated 25.2.61. On 27.6.61 the Chief Regional Manager of the defendant company New Delhi notified the plaintiff that he had forfeited all benefits under the policy and his claim stood rejected. The conclusion of the police that the fire was accidental was not correct. Mr. Sarin of Messrs. V.N. Sarin and Co. was appointed as the Surveyor. The survey report was also against the plaintiff. There was further correspondence between the parties. On 9-5-61 the plaintiff submitted a list of goods destroyed by fire but that was beyond time. The plaintiff had been guilty of suppression of facts in the proposal form while replying questions 8(a) and (b) in the proposal form. He had formerly insured the same goods in the year 1957 with the Ruby General Insurance Co. Ltd. and the shop was gutted in that year and the plaintiff's claim which was a huge amount was settled by that company at Rs. 14860/-. The plaintiff had not complied with conditions 11 and 13 of the policy. Therefore he was not entitled to any amount. The presence of the uninsured goods in the shop was also denied. Even if there were any such goods the defendant was not liable for the loss alleged to have been caused to the plaintiff by the fire of 5.11.61.

6. On these pleadings my learned predecessor-in-office framed the following issues in the case:

(1) Is the suit properly stamped? OPP

(2) Is the plaint properly verified? OPP

(3) What was the value of the goods lying in the shop of the plaintiff at the time of the fire on the night of 4/5th February 1961 and what was the value of the goods damaged or destroyed by the fire?

(4) Is the plaintiff's right to claim extinguished by lapse of time?

(5) Is the plaintiff's suit not within time?

(6) Has the plaintiff been guilty of suppression of material facts and false representation at the time of obtaining the policy from the defendant and as such is the policy of insurance void and unenforceable and not binding on the defendant?

(7) Has the plaintiff not filed claim within the time stipulated in the policy and as such he has forfeited all rights and claims under the policy?

(8) Is the claim of the plaintiff fraudulent?

(9) Was the fire occasioned by the connivance or wilful act of the plaintiff?

(10) Has the plaintiff's goods of the value of Rs. 500/- been damaged or destroyed in the fire of November 1962 in the same premises and if so, is he entitled to get the sum of Rs. 500 from the defendant?

(11) Is the plaintiff not entitled to any relief as he has not filed the suit within 3 months of the rejection of his claim by the defendant as provided in the policy?

(12) To what relief is the plaintiff entitled?

7. One additional issue was framed by order of this court dated 4.10.62 which is to the following effect:

(13) Is the declaration made in support of the suit claim made by the plaintiff true and correct and if not has he forfeited all the benefits under the policy?

11. Before me some of the issues were not at all pressed. For instance, issues 1 and 2 were not at all discussed before me. Therefore, they will be deemed to have been waived. The third issue relates to the value of the goods lying in the shop of the plaintiff at the time of the fire on the night between 4/5th February 61 and the value of the goods damaged or destroyed by fire. The plaintiff in support of this issue has produced the following witnesses:

12. Ama Shah states that the value of goods which were gutted by fire on the night between 4/5th February 1961 in the shop of the plaintiff at Lambert Lane was of the value of thirty to thirty-two to thirty-five thousand rupees. This witness states that he has been carrying on the polishing of the wood carving articles of the plaintiff for a number of years. Mohd. Shaban, who is a broker, states that the goods that were gutted by fire on the relevant night were worth about Rs. 30,000/-. Similarly G.M. Mir who supplied paper machine goods to the plaintiff states that the value of the goods destroyed by fire in the shop of the plaintiff was between Rs. 25 to 30 thousand rupees. The plaintiff's son also places the value of the gutted goods between 25 to 30 thousand rupees. The plaintiff also in his own statement places the same valuation. The evidence of these witnesses is based on their own estimate of the valuation of the goods. No witness has or could possibly state the correct value of the goods gutted. The plaintiff has produced some books, i.e., the sale book, the stock book and the Counter-foils of certain cash memos. According to the plaintiff on the basis of these documents he has fixed the valuation of the goods gutted as given by him in the plaint. Although this evidence is not full proof, yet there is no direct evidence produced by the defendant to contradict this evidence. The surveyor produced by the defendant Mr. V.N. Sarin proprietor of Messrs. V.N. Sarin and Co. puts the estimated loss of goods at Rs. 6508.20, and the furniture at Rs. 150/-.

13. The learned counsel for the defendant has criticized the account books produced by the plaintiff and has stated that they were not genuine. They were prepared for the sake of this case. The plaintiff from the very beginning had an evil design of setting fire to this shop which contained a small quantity of goods, and to inflate and bolster up his false claim he got those account books prepared. He has argued that the account books start right from the date the insurance was effected. He has at length cross-examined the plaintiff's son who has admitted that he writes the accounts of the plaintiff alongwith another clerk, Mohd. Ishaq. According to the learned counsel for the defendant the accounts have been prepared at one time, being in the same ink and hand though covering a sufficiently long period of time. This argument of the learned counsel for the defendant is not without force, but in view of the ultimate fate that the case is to meet at any hands, I do not think I should very seriously probe into the matter of the valuation of the goods that were gutted. I must therefore accept the figure of loss sustained by the plaintiff as put by him as correct. Therefore issue 3 is decided in favour of the plaintiff.

15. The case of the defendant is that under the terms of the policy of insurance the plaintiff had to intimate the details of the loss to the defendant company within 15 days of its occurrence. Further he had to institute a suit within three months of the rejection of the claim by the defendant. The fire broke out admittedly on the night of 4/5th February. 61 The plaintiff did in fact inform the defendant company's branch at Srinagar on the morning of 5th February. The then SHO Kothibagh Mr. Abdul Rashid seized the books of the plaintiff from his house on 5-2-61 and prepared a seizure list Ex. PW2/2. The books remained in the custody of the police till 5-5-61. When the plaintiff moved the ADM Srinagar on 3-6-61; the books were returned to him by means of a receipt Ex. PW 1/2 on 5-5-61, vide the statement of Shambu Nath Head Constable Thana Kothibagh PW 1. It is therefore conceivable that the plaintiff was not in a position to give a detailed list of the articles which were burnt to the defendant company within 15 days. The plaintiff has however given a detailed list of the loss caused to him on 9th May 61. The defendant's contention was based on condition 11 of the policy which runs as under:

> "On the happening of any loss or damage the insured shall forthwith give notice thereof to the company and shall within 15 days after the loss or damage or such further time as the company may in writing allow in that behalf, deliver to the Company.
>
> (a) A claim in writing for the loss or damage containing as particulars an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss and damage thereto respectively, having regard to their value at time of the loss or damage not including the profit of any kind.
>
> (b) Particulars of all other insurances, if any the insured shall also at all time at his own expense produce, procure and give to the company all such further particulars, plans, specifications, books, vouchers, invoices, duplicate or copies thereof, documents, proof and informations with respect to the claim and the origin and cause of the fire and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the company as any, be reasonably required by or on behalf of the company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.
>
> No claim under this policy shall be payable unless the terms of this condition have been complied with."

16. According to the defendant the plaintiff did not supply the detailed list within 15 days of the occurrence of the fire, and therefore the plaintiff forfeited his right under the policy. Emphasis was laid on the last portion of this condition which says that no claim under this policy shall be payable unless the terms of this condition have been complied with. But I think it was physically impossible for the plaintiff till the 5th of May 61, to give a complete and detailed list of the loss sustained by him as his books were with the police. Therefore to that extent the plaintiff has an explanation or a justification in not supplying the detailed list to the company within 15 days of the damage. But there is the second part of this matter which is covered by condition 13 of the policy. This condition runs as under:

> "If the claim be in any respect fraudulent or if any false declaration be made or used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or if the loss or damage be occasioned by the wilful act or with the connivance of the insured, or if the claim be made and rejected and an action or suit be not commenced within three months of such rejection, or in case of an arbitration taking place in pursuance of the 18th condition of this policy within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefits under this policy shall be forfeited."

17. In this case we have it in the evidence of Mr. Jaipal Bahadur D.W. 2 Chief Regional Manager of the defendant company Northern India that the claim of the plaintiff was rejected by means of a letter of the company dated 25.2.61. The same thing has been testified to by Mr. R.N. Dubash D.W. 5 who has been an employee in this concern from 1957 and is now the O/c of the Company at Srinagar. According to him the company rejected the claim of the plaintiff on 25.2.61. There are a number of letters also which reiterate and refer to the initial letter of the defendant dated 25.2.61. All these letters are signed by Mr. K.B. Pestonjee who was then incharge of the Srinagar branch and is now in Manila and therefore incapable of appearing before the court. His signatures have been identified by Mr. R.N. Dubash.

18. The suit was instituted on 1-2-62 which is clearly about a year after the rejection of the claim of the plaintiff by the defendant. Therefore in terms of this policy the right of the plaintiff to recover the suit amount is extinguished. In the proposal form Ex. D.W. 4/1 the condition is that the declaration made in this form shall be the basis of the contract between the parties. The insurance company agrees to compensate the insured only subject to the conditions mentioned in the policy which appear on the back of the policy.

19. An argument has been advanced that the condition of instituting legal proceedings within three months of the rejection of the claim of the insured by the insurance company is against section 23 and 28 of the Contract Act. Section 28 reads as under:

> "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

20. Section 23 of the Contract Act makes the following agreements as unlawful: If they are forbidden by law or are of such a nature that if permitted would defeat the provisions of any law, or are fraudulent, or involve or imply injury to the person or property of another, or if the court regards them as immoral or opposed to public policy. A list of illustrations is appended to this section.

22. Section 28 makes all agreements in restraint of legal proceedings void.

23. It is argued that such an agreement is immoral and opposed to public policy and further it curtails the ordinary period of limitation. I need not consider these sections in detail because the matter is completely covered by authority. It will surely be a waste of time to embark on a discussion of the points raised. The following authorities may be mentioned:

In Porter's ***Law of Insurance*** (6th Edn.) page 195 it is stated that insurance may lawfully limit the time within which an action may be brought to a period less than that allowed by the statute of limitation and that the true ground, on which the clause limiting the time of claim rests and is maintainable is that, by the contract of the parties the right to indemnity in case of loss and the liability of the Company therefor do not become absolute, unless the remedy is sought within the time fixed by the condition in the policy. In AIR 1924 Cal 186 some English cases were discussed and condition No. 13 of the policy as in the present case was there. The condition amongst other things stated:

> "If the claim be made and rejected and an action or suit be not commenced within 3 months after such rejection and in the case of arbitration taking place in pursuance of the 18th condition of this policy within three months of the arbitration when the arbitrator or the umpire shall have made the award, all benefits under the policy shall be forfeited."

In this case an action commenced after the stipulated period of three months was held to contravene neither section 23 nor section 28 of the Contract Act.

27. The latest authority on the subject is AIR 1966 All 385 wherein according to a clause in the loss-cum-fire insurance policy the insured had to file within 15 days of the loss a complete claim giving full particulars. The loss occurred on 18-8-47. Insured sent a telegram on 21-8-1947 as "sugar is looted. Please note." The company replied on 25.8.47 asking for policy number and circumstances of loss. The insured sent reply on 8.9.47 giving some particulars. Even this did not give all particulars. The company ultimately rejected the claim. On these facts it was held that the communication was beyond 15 days. The mere fact that the application under section 13 of the Displaced Persons (Debts Adjustment) Act 1951 regarding the claim of the insured who was a displaced person was within time, would not entitled him to get any relief in respect of the loss.

28. In this case even if the plaintiff was entitled to any relief he had forfeited all rights under the policy when he failed to bring his suit within three months of 25th February 61 when his claim was rejected by the insurance company. The claim was not rejected only once, but the basic stand taken by the company in its letter of 25.2.61 was repeated in a number of letters, for instance, D.W. 5/2 dated 28.2.61, D.W. 5/3 dated 27.12.61, D.W. 5/4 dated 21.11.61 and D.W. 2/1 dated 27.6.61. The plaintiff had no justification to wait till 1.2.62 to file the suit. By that time his right had been completely extinguished.

29. In this way issues 4, 5, 7 and 11 are decided against the plaintiff. His suit is clearly time-barred.

30. The second group of issues that can be conveniently taken up together is Nos. 6, 8, and 13. The case of the defendant is that the plaintiff has been guilty of suppression of material facts and has made a false representation at the time of obtaining the policy from the defendant. His claim cannot therefore be entertained. Emphasis on this aspect of the case is laid on the reply of the plaintiff to question 8(a) and 8(b) of the proposal Ex. D.W. 4/1 which is as under:

> 8 (a) Has the property been insured in the past or at the present time? If so, give full particulars.

8(b) Have you sustained loss. Give full particulars.

To both these queries the plaintiff has said 'No.'

31. The contention of the learned counsel for the defendant is that the plaintiff had insured the goods of his shop with another insurance company in the year 1957 namely, the Ruby General Insurance Co. During that year also his shop was gutted by fire. He made a claim for Rupees 25,000/- from the Insurance Company, but his claim was settled at Rs. 14807/-. According to the Manager of the Ruby General Insurance Co., Mr. D.N. Chopra, the settlement was arrived at on 24.2.58. The shop of the plaintiff had caught fire on 24.4.57 and the policy of insurance with that company had come into force for one year from 9.10.56 to 9.10.57. The plaintiff and his son admitted this previous insurance, but their case was that the plaintiff is an illiterate person who does not know English. He only know how to sign 'K.A. Bulbul' and at the time of entering into the present contract he was not explained the terms of the proposal form or of the insurance policy. D.W. 4 Abdul Ahad Sheikh, Inspector of the New India Assurance Co. has deposed on solemn affirmation that he filed in the form Ex. D.W. 4/1 on 5th June 60 and the answer that he entered against each query in the proposal form was at the instance of the plaintiff. He made the plaintiff understand all the questions and recorded his answers. Col. No. 8 was also filled at the instance of the plaintiff. The plaintiff signed the proposal form after knowing the contents thereof. The plaintiff however tried to negative this evidence by the statement of Gulla Khan who says that the plaintiff is an illiterate person. In view of the statement of Abdul Ahad Sheikh and reading in between the lines the statement of the plaintiff himself, it is difficult to hold that the plaintiff was not put a specific question whether he had not insured this property with another insurance company earlier. I feel that the plaintiff purposely withheld this information from the insurance agent because when previously he had insured the goods of the shop with the Ruby G. Insurance Co. and his shop had caught fire he had claimed Rs. 25000 but was given only Rs. 14000 and odd. Feeling somewhat apprehensive about the state of affairs then, he wilfully suppressed this fact from the defendant insurance company. So on facts it is proved that the plaintiff has made a false statement in reply to question No. 8.

32. Now we have to see what is the legal effect of this false statement. The law on this point is so well settled both in England and India that it does not require any elaborate discussion. Anyhow the following authorities may be mentioned.

33. The effect of non-disclosure or misrepresentation is that the insurers have the right to repudiate, that is to say, to avoid contract.

34. Where, however, insurers answer a claim by repudiating the policy on the ground of fraud, misrepresentation or non-disclosure, they are not bound to offer a return of premium

39. The matter has again been fully discussed in AIR 1962 SC 814 where a policy holder who had been treated a few months before he submitted his proposal for the insurance of his life with the insurance company by a physician of repute for certain serious ailments as anaemia, shortness of breath and asthma, not only failed to disclose in his answers to the questions put to him by the insurance company that he suffered from these ailments but he made a false statement to the effect that he had not been treated by any doctor of any such serious ailment, it was held that judged by the standards laid down in section 17 Contract Act,

the policy holder was guilty of a fraudulent suppression of material facts when he made his statements, which he must have known were deliberately false and hence the policy issued to him relying on those statements was vitiated. In the circumstances of the case it was held that no advantage could be taken of the Explanation to section 19 of the Contract Act. In this case it was further held:

> "Where, according to terms of the life insurance policy, all moneys that had been paid in consequence of policy would belong to the insurance company if the policy was vitiated by reason of a fraudulent suppression of material facts by the insured, and the contract is bad on the ground of fraud, the party who has been guilty of fraud or a person who claims under him cannot ask for a refund of the money paid. It is a well established principle that courts will not entertain an action for money had and received where, in order to succeed, the plaintiff has to prove his own fraud. Further in cases where there is a stipulation that by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract, neither S. 65 nor S. 64 of the Contract Act has any application."

40. In view of all these authorities, it is clear that the plaintiff simply on the ground that he gave a false reply to questions 8(a) and (b) in the proposal form cannot claim any compensation for fire having been caught by the goods in his shop. In this case the question was very material and withholding of the real information from the insurance company would automatically absolve the insurance company from any liability under the contract. As already remarked, the Privy Council has gone to the length of holding that the answers to a question being material or immaterial, would not make any difference. The plaintiff's suit would therefore fail on this account alone.

41. Issue 8 is not very clear but I have grouped it with issues 6 and 13. In my opinion this issue is based on the fraud alleged to have been committed by the plaintiff in suppressing the material information regarding the previous insurance of the goods of his shop with the Ruby General Insurance Co. in the year 1957. But if this issue is construed as suggesting that the claim of the plaintiff is not bonafide, I have given my finding already that all the weaknesses that the plaintiff's case may have, it can be safely held that it is proved that he lost goods of the valuation mentioned in the plaint during the fire. So these observations dispose of issues 6, 8 and 13.

42. The learned counsel for the defendant has laid great stress on the fact that the fire was caused by the wilful act of the plaintiff. No doubt the plaintiff's conduct is somewhat not above suspicion. According to the plaintiff and his witness Ama Shah, his son Safdar Ali and the plaintiff himself they closed the shop as usual at about 7.30 in the evening. The shop caught fire in the night. The plaintiff or anybody on his behalf did not repair to the scene of occurrence till 10 the next morning. The plaintiff says that he did not know about the occurrence. Although this statement would seem improbable, but there is nothing on the file to clearly contradict this statement of the plaintiff. The police registered the case as a suspicious one and conducted investigation but later on the police also discovered that the fire was accidental (Vide the statement of Abdul Rashid P.W. 2). The defendant has led no positive evidence to show that the plaintiff himself set the goods of his shop on fire. The

defendant's case is based on certain suspicious entries in the account books of the plaintiff and on the conduct of the plaintiff. But that by itself is not sufficient to hold that the plaintiff himself wilfully set his shop on fire or connived at it. In my opinion this issue should be decided against the defendant.

43. The plaintiff claims Rs. 564.50 as the value of uninsured goods which caught fire on November 3, 1961 because according to him the keys of the shop were still with the defendant company. In the first place the plea of the plaintiff that the shop remained under the possession and lock and key of the defendant up to 3rd November 61 is not established. Apart from that fact unless it is shown that the destruction by fire of this uninsured goods was the result of the negligence of the defendant, no responsibility can be fastened upon the defendant. If the plaintiff's case were that he was present on the scene of occurrence on November 3, 1961 to salvage his merchandize, but for the fact that the shop was locked by the defendant, there was some case for the plaintiff. But there is no such suggestion on the part of the plaintiff. Even if the shop was under the lock and key of the defendant and it caught fire which was accidental the defendant would not by the mere fact of the destruction of the goods therein be liable for the damage. Therefore, in my opinion, the plaintiff cannot even claim this amount.

44. From the finding on the issues recorded above, the plaintiff's suit has to be dismissed and is hereby dismissed.

* * * * *

Smt. Krishna Wanti Puri v. *Life Insurance Corporation of India*

AIR 1975 Del. 19

AVADH BEHARI ROHTAGI, J. – On February 19, 1968, Smt. Krishna Wanti Puri, widow of Late Dharam Pal Puri instituted an action against the Life Insurance Corporation for the recovery of Rs. 85,000/- and profits and interest on the four policies.

2. Dharam Pal Puri when he was alive insured his life with the Corporation and took out four policies.

3. Dharam Pal Puri died on 5th August 1964. The widow claims the amount of the four policies from the Corporation on the ground that she is the assignee. The Corporation resists the suit. The main ground of defence is that Dharam Pal Puri was suffering from heart disease, that he know about his ailment, that he had consulted doctors about his disease but fraudulently suppressed these facts. In the proposal forms and the personal statements, he made declarations knowing them to be false because he never disclosed to the Corporation that he was suffering from heart disease.

4. On the pleadings of the parties the following issues were framed on merits on 19th August, 1969:

(1) Is the plaintiff entitled to recover the amount, if any, due to her on the policies mentioned in the plaint on the allegations made in the plaint? O.P.P.

(2) Who is the assignee of these policies? O.P.P.

(3) Are the defendants entitled to deny payment to the plaintiff on the grounds stated in the written statement? O.P.D.

(4) Relief?

Issue No. 3:

5. The only question that arises for decision is whether the widow is entitled to recover the amount of the four policies from the defendant Corporation or whether the Corporation is entitled to avoid the policies and refuse to pay the amount to her on the ground that the deceased fraudulently concealed and suppressed material facts which were necessary for the insurer to know.

6. The chief issue in the case is Issue No. 3 and clearly the onus of this issue was on the defendant Corporation to prove fraudulent concealment and material suppression of facts. In support of their case, the Corporation examined three doctors. They are Dr. Santosh Singh who was examined on commission. Dr. (Miss) S. Padmavati (D.W. 3) and Dr. V.K. Dewan (D.W. 10). In order to appreciate their evidence, it is necessary to set out the relevant questions which were required to be answered by the deceased in the personal statements and the answers given by him thereto.

Question	***Answer***
What has been your usual state of health?	Good
Have you consulted a medical practitioner within the last five Years? If so, give details	No
Have you ever suffered from any of the following ailments -	No

Fainting attacks, pain in chest, breathlessness, palpitation or any disease of the heart?	No
Any other illness within the last five years requiring treatment for more than a week	No
Have you ever had any electric cardiogram, X-ray or fluoroscopic examination made or your blood examined. If so, give details.	No
Have you ever been in any hospital, asylum or sanatorium, check up, observation, treatment or an operation.	No

7. In identical terms were the answers of the deceased in all the four policies. On the basis of these statements the Corporation issued the policies.

8. On the death of Dharam Pal Puri the widow made a claim and gave to the Corporation the certificate of death of her husband. From the certificate the Corporation came to know that the deceased was admitted in Sir Ganga Ram Hospital on 4th August, 1964 and died there on 5th August 1964. The Corporation also learnt that the deceased was suffering from Mitral Stenosis with auricular fibrillation and that he died of this disease in the hospital. The Corporation made certain investigations and as a result came to the conclusion that Dharam Pal Puri was suffering from this heart disease since 1959 in any case, if not earlier. The Corporation contacted the three doctors named above and took from them certificates stating that the deceased was suffering from this heart disease.

9. Dharam Pal Puri consulted Dr. (Miss) S. Padmavati on 29th May, 1959 and 25th of September, 1959. Dr. Padmavati appeared in the witness-box and deposed to this effect. She had at the request of the Corporation issued a certificate on 11th December, 1964, in which she had stated that the deceased was examined by her on these two occasions and that he suffered from Mitral Stenosis with auricular fibrillation. In the certificate she had also said that the deceased was suffering since 1946 according to the statement of the patient himself which was made to her. The Doctor never saw the patient after 25th September, 1959. When Dr. Padmavati was examined in court on 9th October, 1970 she said that she verified the contents of certificate (D-6) issued by her from the records of the Lady Harding Hospital which were supplied to her. It appears that on 11th December, 1964, when she gave the certificate the records of the Lady Harding Hospital were available to her. She was Professor of Medicine in Lady Harding Medical College at that time. She is F.R.C.P. of London and F.R.C.P. of Edinburgh. She also deposed that before she signed the document she verified the name, address and age of the patient from the record. As regards the nature of the disease, she said this:

> "Mitral stenosis is a type of rheumatic heart disease. Auricular Fibrillation is a complication of mitral stenosis in which an abnormal rhythm is supers-imposed. According to entry made in Col. 5 the patient's case was a case of serious form of heart disease. This disease can be checked without doing the electro cardiogram. This disease can be checked by a stethoscope. Normally a general medical practitioner should be able to check this disease."

10. The next medical man who was approached by the Corporation to find out the nature of the disease from which Dharam Pal Puri was suffering was Dr. V.K. Dewan. He had also

similarly certified on 17th November, 1964, that Dharam Pal Puri suffered from the very ailment of which Dr. Padmavati deposed. He also said that deceased had been suffering from this disease for about five or seven years before his death. Dr. Dewan is an honorary physician in Sir Ganga Ram Hospital. He attended on the deceased when he was admitted to the hospital on 4th August, 1964. In his evidence before the court he stated that the contents of his certificate (D-7) were correct and the entire form had been filled up by him in his own hand. He derived the information from the hospital record where the patient was admitted.

11. Dr. Santosh Singh was examined on commission at Ranchi. When the deceased was admitted to the hospital in August 1964, Dr. Santosh Singh was the Registrar of Sir Ganga Ram Hospital. He also attended on the deceased on the 4th and 5th of August, 1964, and similarly gave two certificates regarding the hospital treatment. In the two certificates (B-2 and B-3) Dr. Santosh Singh stated that Dharam Pal Puri was suffering from Mitral stenosis and died as a result of heart failure. He said that the deceased had been suffering from this disease for about seven years before his death and the symptoms of this illness were first observed by the deceased about seven years ago. Both these certificates were signed by Dr. Santosh Singh. He solemnly declared that the foregoing statements were true and correct to the best of his knowledge and that the information was correct as per records of the hospital. These certificates are dated 31st October, 1964. Dr. Santosh Singh also signed a report regarding the deceased wherein too he stated that the deceased was suffering from this ailment for the last 7½ years. These certificates and report were obtained by Shri P.C. Puri, the brother of the deceased, and were passed on to the Corporation. These certificates set the Corporation thinking and put the officials on enquiry regarding the cause, place and the date of his death.

12. Later on it appears that Dr. Santosh Singh was prevailed upon by the relatives of the deceased and he issued another certificate of hospital treatment dated 24th October, 1964 and a report dated 28th November, 1964. In the certificate and report Dr. Santosh Singh stated that some attendant on the deceased had reported to him that Dharam Pal Puri had been suffering from the disease only for the last years. The relative also procured another medical attendant certificate dated 30th October 1964, purported to be signed by Dr. Santosh Singh wherein it was stated that the deceased had been suffering from this disease for about 1½ years before his death. A photostat copy of this certificate dated 30th October, 1964, was produced during the examination of Dr. Santosh Singh on commission. The original of this document has not been placed on the record. In his examination Dr. Santosh Singh admitted the correctness of all the documents. He also admitted that Dr. V.K. Dewan was the physician incharge who was attending on the deceased in the hospital. He admitted that the records of the hospital were available to him at the time of signing the two certificates (B-2 and B-3). When it was pointed out to the witness that in some certificates he had given the duration of the disease 7½ years and in some 1½ years, the witness said:

> "It appears that certain entries in Exhibit B-2 and Exhibit 'E' different. I cannot assign any reason unless I see the original records. Without reference to the original record it is not possible to say whether the entries in the certificates are correctly made."

13. This is the evidence of the three doctors and the counsel for the Corporation strongly relies on their evidence to show that the deceased had been suffering from heart disease since 1946 and, as has been proved in the evidence of Dr. Padmavati, that Dharam Pal knew about the same and that is the very disease of which he ultimately died. On the ground of fraud and suppression of material facts, the counsel urges that the Corporation is entitled to avoid all the four policies.

15. In ***Mithoolal Nayak* v. *Life Insurance Corporation of India*** [AIR 1962 SC 814], it was held that the three conditions for the application of the second part of Section 45 are:

(a) the statement must be on a material matter or must suppress facts which it was material to disclose;

(b) the suppression must be fraudulently made by the policy holder; and

(c) the policy holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

16. The crucial question before me is whether these three conditions were fulfilled in the present case.

17. Now what is the nature of a contract of insurance? Contracts of insurance are ***uberrima fides*** and therefore the insured owes a duty to disclose before the contract is made every material fact of which he knows or ought to know. If a material fact is not so disclosed, the insurers have the right at any time to avoid the contract. As Lord Mansfield demonstrated in ***Carter* v. *Boehm*** [(1763) Sm 5 KC 546, 550], insurance is a contract upon speculation where the special facts upon which the contingent chance is to be computed lie generally in the knowledge of the assured only, so that good faith requires that he should not keep back anything which might influence the insurer in deciding whether to accept or reject the risk. A fact is material if it is one that would affect the mind of a prudent man, even though the assured does not appreciate the materiality. In the words of Bayloy, J.:

> "I think that in all cases of insurance whether on ships, houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be in the interest of the assured to make a full and fair disclosure of all the information within their reach."

18. In India, the duty of disclosure in the case of marine insurance is prescribed as follows in the Marine Insurance Act, 1963:

> "S. 20(1) Subject to the provisions of this section, the assured must disclose to the insurer before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known to him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

19. A similar duty of disclosure exists in the case of non-marine insurances. Whether the policy is taken out for a life, fire, burglary, fidelity or accidental risk, it is the duty of the assured to give full information of every material fact; and it has been held by the Court of Appeal in England that the definition of "material" contained in the Marine Insurance Act, 1906 namely, every circumstance which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk is applicable to all forms of insurance.

20. Life Insurance stands on the same footing. The provisions of Marine Insurance Act in India are in *par materia* with the English Act in this respect. I would, therefore, similarly hold that the test of what is a material fact and the degree of good faith, which is required, is otherwise the same in all classes of insurance.

23. Any material fact that comes to the knowledge of the proposer; the would-be assured, before the contract is made must be disclosed. The duty to disclose all material facts to the insurer arises from the fact that many of the relevant circumstances are within the exclusive knowledge of one party, and it would be impossible for the insurer to obtain the facts necessary for him to make a proper calculation of the risk he is asked to assume without this knowledge. It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy, that, as the underwriter knows nothing and the would-be assured knows everything, it is the duty of the assured to make a full disclosure to the underwriters of all the material circumstances.

24. The words 'prudent insurer' in Section 20(2) of Marine Insurance Act should be noted. They mean that in a dispute the court must apply the objective standard of business usage and disregard the exacting standard of a particular insurer. Circumstances that need not be disclosed include those diminishing the risk and matters of common knowledge generally or in the insurer's business. The prospective assured must disclose material circumstances that he knows or ought to know: (See Section 20, Marine Insurance Act, 1963).

25. Whether the omission to disclose any particular circumstance is material so as to render the contract voidable is a question of fact in each case.

26. The present case, however, presents no difficulty. If the assured had truly disclosed his illness that fact would have certainly influenced "the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk."

27. If the insured makes a statement containing certain information and the policy contains a term to the effect that the proposal form constitutes the "basis of the contract," the insurers are entitled to avoid liability if any answer in the proposal form is incorrect, whether it is material or not. The insurers are entitled to avoid liability if any answer in the proposal form is incorrect irrespective of whether the insured made the answers fraudulently or innocently and irrespective of whether the answer relates to a material fact.

31. In India, the Legislature has enacted in Section 45 of the Insurance Act that no policy of life insurance shall be called in question by an insurer on the ground that a statement made

in the proposal form "leading to the issue of the policy" was inaccurate or false "unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy holder and that the policy holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose." The statute therefore, superimposes the test of materiality on the terms and conditions of the proposal. The contractual freedom of the insurers has been severely restricted by the Indian Legislature. The insured has thus been sufficiently protected and the resulting contract cannot be rescinded merely upon proof that the information is inaccurate, unless all the three conditions of Section 45 are satisfied. In this sense Indian Law is a distinct advance upon the English Law.

32. In this case it is clearly provided in the proposal form of the Corporation that the declarations of the assured shall be the "basis of the contract" and that

> "If any untrue averment be contained therein the said contract shall be absolutely null and void and all moneys which shall have been paid in respect thereof shall stand forfeited to the Corporation."

33. In view of the term of the policy the insurer is entitled to avoid the contract as there was misrepresentation and concealment by the assured. No one will doubt that the questions in the proposal form regarding state of health were on a material matter and that the answers given by the assured were fraudulent and false. Insurers are generally well able to take care of their own interests by requiring a prospective insured to complete an application form giving information on a wide range of matters. But the important thing is that answers to material questions must be accurate and true. From the very necessity of the case, the assured alone possessed full knowledge of all the material facts and the law required him to show *uberrima fides*. The insurer contracts on the basis that all material facts have been communicated to him; and it is a condition of the contract that the disclosure shall be made and that if there has been a non-disclosure, he shall be entitled to avoid.

35. To use the language of the Indian Statute, a contract of insurance is a "contract based upon the utmost good faith, and if the utmost good faith be not observed by either party, the contract may be avoided by the opposite party" (Section 19, Marine Insurance Act).

36. The general principle of good faith governing insurance is tersely stated by Lord Chorley:

> "The general principle governing insurance is that of good faith. In a sense this applies to all contracts, but an insurer can insist on a more stringent requirement - utmost good faith. The terminology is unfortunate, for good faith, in ordinary parlance, is an absolute term; it cannot be graded. Ordinarily a person has acted either in good faith or in bad faith. But in insurance law utmost good faith has a precise meaning and a genuine purpose.
>
> In negotiations for an ordinary contract no party must say anything that misleads the other party. If he does the other party can avoid the contract… In insurance, however, the cards are stacked against the insurer. The buyer can inspect the goods, and the employer can obtain references about a candidate for employment, but the insurer has very few means of discovering the nature and magnitude of the risk.

> Accordingly, in law prospective assured refrain from actively misleading the insurer he must also disclose all material circumstances".

37. Dharam Pal Puri must have known that it was material to disclose the fact of his ailment to the Corporation. In the answers to the questions put to him he not only failed to disclose what it was material for him to disclose, but he made a false statement to the effect that he had never suffered from any disease of the heart. In other words, there was a deliberate suppression fraudulently made by Dharam Pal. Fraud, according to Section 17 of the Indian Contract Act, means and includes *inter alia* any of the following acts committed by a party to a contract with intent to deceive another party or to induce him to enter into a contract.

> (1) The suggestion as to a fact of that which is not true by one who does not believe it to be true; and (2) The active concealment of a fact by one having knowledge or belief of the fact.

Judged by the standard laid down in Section 17, Dharam Pal Puri was clearly guilty of a fraudulent suppression of material facts when he made declarations in the proposal form, statements, which he must have known, were deliberately false.

38. The counsel for the plaintiff has argued that the statement of Dr. (Miss) Padmavati should not be believed as the original record of the Lady Hardinge Medical College and Hospital was not produced in court at the time she made her statement. This is true that she gave her deposition in court with the help of the certificate that she had issued in 1964, though she was examined on November 9, 1970. In the course of arguments I ordered that the original record of the hospital should be produced. Today the medical record keeper appeared in court and stated that the record of outdoor patients was maintained in the hospital only for a period of five years and was destroyed thereafter. Dharam Pal Puri was examined by Dr. (Miss) S. Padmavati as an outdoor patient obviously. Dr. (Miss) S. Padmavati did not depose that Dharam Pal Puri was admitted to the hospital. The record of outdoor patients, therefore, could not be produced. Probably by 1970 when Dr. (Miss) S. Padmavati was examined in court the record of the hospital had been destroyed because she examined the patients in 1959. The fact of the destruction of the record does not destroy the probative value of Dr. (Miss) S. Padmavati's evidence. In her statement she unequivocally stated that she examined Dharam Pal Puri on two occasions and had referred to the record before signing the statement and that the deceased was suffering from heart disease. I have not reason to disbelieve the testimony of a doctor of the eminence of Dr. (Miss) S. Padmavati. What axe she had to grind, what motive to perjure herself? I feel confident to base my conclusion on her evidence because similar was the evidence of Dr. V.K. Dewan and of Dr. Santosh Singh in his two earlier certificates dated October 31, 1964, and the report dated August 4, 1964.

39. The Plaintiff's counsel then argued that no reliance should be placed on the testimony of Dr. V.K. Dewan and Dr. Santosh Singh as they were never told by the deceased that he was suffering from heart trouble for the last seven years. It is true, as appears from the evidence, that Dharam Pal Puri was unconscious when he was admitted to the hospital on August 4, 1964, and his brother who accompanied him gave his past medical history. It is so stated in Exhibit B-2, certificate dated October 31, 1964, of Dr. Santosh Singh. When the

deceased was unconscious, his brother was the best person to give the past history of his brother. At that time his brother was telling the truth because he was interested in saving somehow the life of Dharam Pal his brother. He knew that without disclosing correctly the illness and its past history doctors in the hospital would not be able to give treatment to his brother. It is only later on that Dr. Santosh Singh was prevailed upon to issue certificate and report wherein the doctor changed his stand and said that the illness was of only 1½ years standing before the death. Since I had some doubts on the veracity of the certificates issued by Dr. Santosh Singh for he issued as many as five certificates and reports, I ordered that the original record of Sir Ganga Ram Hospital be produced before me. Today Shanti Swarup Sharma (P.W. 3) brought the original record. I have examined the original record and found that some one had written on the case sheet 7½ years originally. This figure of 7½ was obliterated and in its place 1½ years was written. The two writings are quite different. The entire case-sheet, it is in the evidence of Shanti Swarup Sharma (P.W. 3) is in the hand of Dr. Santosh Singh, who actually made this obliteration is not clear because Dr. Santosh Singh could not be examined with reference to the original case-sheet which I have today before me and which the witness did not have at the time of making his statement on commission. On a consideration of the entire evidence, no doubt is left in my mind that the deceased was suffering from this heart disease since 1946 as deposed by Dr. (Miss) S. Padmavati, for five or seven years as deposed by Dr. V.K. Dewan or for about seven years as was certified by Dr. Santosh Singh in his two certificates and 7½ years as stated by him in his report. In view of the incontrovertible evidence on the record I will discard from consideration the certificate dated August 24, 1964, and the report dated November 28, 1964 of Dr. Santosh Singh. Similarly, the photostat copy of the certificate dated October 31, 1964 is no piece of evidence in this case as the original was never produced in court.

40. On behalf of the plaintiff two witnesses were examined. The first was P.C. Puri, the brother of the deceased. He merely stated that his brother died on August 5, 1964 and that he entered into correspondence with the Corporation after the death of his brother for the purpose of claiming the amount from them. The insurance agents who had come to insure the deceased, he said, filled the proposal forms for these policies, in his presence.

41. The next witness examined by the plaintiff was the widow Krishna Wanti Puri. She completely denied that her husband ever consulted Dr. (Miss) S. Padmavati prior to his death. She also said that she did not know the name of the doctor who attended on the deceased at the time of his death and what was the result of the doctor's examination. As regards the deceased's illness, she simply said that her husband developed pain in the hip on the morning of August 4, 1964, and he had to be removed to the hospital. As regards other questions put to her she stated that the deceased's elder brother was dealing with the matter of insurance and that she knew nothing about these matters. The cumulative result of the evidence adduced on both sides is that there is no evidence of the doctors examined on behalf of the Corporation to show that the deceased's illness was of the heart and that he suffered from the same since 1946 and that he actually died of it. There is no rebuttal to this evidence on behalf of the plaintiff. Mere denial by the widow takes us nowhere. The brother of the deceased who, according to the widow, knew everything about his own brother said nothing in evidence to disprove the testimony of the doctors. The main plank of the plaintiff's claim is

the certificate and the report of Dr. Santosh Singh wherein the doctor had given the period of illness as 1½ years. The certificates and the report, I have already said, are not worth relying upon for the rest of the evidence on the record which in my opinion is overwhelming, contradicts the correctness of the certificate and the report dated November 24, 1964 and November 28, 1964, respectively.

42. The plaintiff's counsel lastly urged that before the deceased was insured he was examined by as many as three doctors of the Corporation Dr. Uppal, Dr. R.N. Rohtagi and Dr. Kartar Singh. All these doctors appeared in the witness-box on behalf of the Corporation. It is true that all of them deposed that in their opinion the deceased was fit to be insured at the time of their examination but their evidence does not advance the case of the plaintiff. The corporation did not know that there was a fraudulent suppression of facts by the deceased. The terms of the policy make it clear that the averments made as to the state of health of the insured in the proposal form and the personal statement were the basis of contract between the parties and the circumstances that Dharam Pal Puri had taken pains to conceal that he had ever been treated for this serious ailment by Dr. (Miss) S. Padmavati when in fact he had been treated only a few months before he took out the first policy dated October 12, 1959, shows that the fraudulent suppression and concealment had an important bearing in obtaining the consent of the Corporation.

43. On the whole case my conclusion is that the declarations made by the deceased in the personal statement were on a material matter and that he suppressed fraudulently facts which were material to disclose and that the deceased knew at the time of making the statement that it was false and that he suppressed facts which it was his duty to disclose.

44. I, therefore, hold that the Corporation is entitled to avoid the policies on the grounds available to the insurers under Section 45 of the Act, which I have reproduced above.

***Issue No. 2*:**

45. In view of my decision on Issue No. 3, this issue does not arise.

Issue No. 1:

46. I have already held that the Corporation is entitled to avoid the policies and therefore, the plaintiff is not entitled to claim the amount on the four policies from them.

Issue No. 4:

47. As a result of my finding on Issue No. 3, I dismiss the suit of the plaintiff, leaving the parties to bear their own costs.

48. As regards the premium paid by the deceased on the four policies, the rule of law is that if the policy is voidable owing to fraudulent misrepresentation, the insurer can have the policy set aside without having to return the premiums. The Supreme Court has held in ***Mithoolal Nayak*** that in a case of fraud the plaintiff cannot claim or ask for the refund of the money paid. It was held that the courts would not entertain an action for money had and received where in order to succeed the plaintiff has to prove his own fraud. Above all the policy contains the term that if the policy is void the premium shall be forfeited and this term will prevent the premiums from being recoverable.

Smt. Dipashri **v.** *Life Insurance Corporation of India*

AIR 1985 Bom. 192

PENDSE, J. – The unfurling of the facts would disclose the sorrow plight of a young widow who had to bring up three minor children when her husband died in an unfortunate accident. The petitioner's husband was employed as a Clerk in Mackinnon Mackenzie Private Limited for about 19 years. The deceased husband of the petitioner took out a double benefit policy while in the employment. The deceased husband submitted to respondent 1 a proposal for issue of an Endowment Policy under Table 25 for 20 years for Rs. 30,000/- on July 5, 1975. The monthly premiums of the said policy were to be paid directly through the salary saving scheme of Messrs. Mackinnon Mackenzie. The policy was taken out by the deceased husband as "Provision for future" and the monthly premiums were paid regularly as per the contract of Insurance. Prior to the acceptance of the Policy by the Life Insurance Corporation, the deceased husband of the petitioner was examined by doctors on the panel of the Corporation and after the doctors certified about the sound health of the petitioner's husband, the proposal was accepted by the Corporation and the policy was issued on July 7, 1975. On Oct. 4, 1977, the petitioner's husband while lighting the Stove in the Kitchen, accidentally sustained severe burns. The petitioner's husband was removed to the Nursing Home and from there to Cooper Hospital but succumbed to his injuries on Oct. 8, 1977. The Coroner issued a certificate certifying that the death occurred due to toxaemia following 50% burns sustained accidentally by the deceased. It is not in dispute that the burns were suffered in an accident when the Stove caught fire.

3. On Oct. 24, 1977, the petitioner addressed a letter to the Senior Divisional Manager - respondent 2 - requesting to settle the Insurance claim under the policy. The Agent of the Corporation who had insured the deceased also requested respondent 2 to pay the amount under the Policy. The Senior Divisional Manager called upon the petitioner to fill up certain forms and return the same along with original Policy. The petitioner was nominated by her husband as the person entitled to receive the amount. The petitioner carried the requirements of the Corporation but was informed by the Senior Divisional Manager by letter D/- Aug. 25, 1978 that the Corporation repudiates all liabilities under the policy as the deceased had deliberately made misstatements and withheld material information regarding the health at the time of effecting assurance with the Life Insurance Corporation. The letter, inter alia, recites that the answers to the following questions given by the deceased were incorrect and false:

	Answers
Q. No. 4(d): Have you consulted a medical practitioner within the last five years? If so, give details	*No*
***Q. No. 6*:** Have you ever suffered from any of the following ailments?	
Q. No. 6(a): Giddiness, fits, neurasthenia, paralysis, insanity, nervous breakdown or any other disease of the brain or the nervous system	*No*
Q. No. 6(d): Sprue, Jaundice, Anaemia, Dysentery, Cholera, Abdominal pain, Appendicitis or any disease of the stomach, liver, spleen or intestine?	*No*

Q. No. 8(b): Have you remained absent from your work on grounds of health during the last two years?
If so, when, how long and what ailments? *No*

The letter further recites that the answers to the questions set out hereinabove were false and the Corporation holds indisputable evidence to establish that before the date of proposal, the deceased suffered from bleeding from fissure cuts, inflamed piles and rectum in April-May 1972, from low blood-pressure, giddiness and weakness in Dec. 1972 and from Influenza in July 1973, Nov. 1973, Sept. 1974, Nov. 1974 and Feb. 1975 for which the deceased was under treatment of doctors and had also availed of leave on Medical grounds. It was claimed by the Corporation that as the deceased did not disclose these facts in the personal Statement form and instead gave false answers in terms of Policy contract and the declaration contained in the form of proposal for assurance and personal statement, the Corporation repudiates the claim and accordingly are not liable for any payment under the policy and all moneys paid as premiums under the policy stand forfeited. The petitioner appealed to the Corporation that the Corporation should not repudiate the contract and decline to pay the amount to the poor widow who had to bring up three minor children, including two daughters, in life. The petitioner pointed out that her husband died at a very young age of 43 years and the Corporation should not jump to the conclusion that the deceased was suffering from piles, giddiness and Influenza merely from the fact that the deceased had taken sick leave from his office.

"Sick Leave	30 days	14-4-72	to	14-5-72
"	8 days	18-12-72	to	26-12-72
Sick	6 days	24-7-73	to	29-7-73
"	3 days	17-9-73	to	19-9-73
"	9 days	20-11-73	to	28-11-73
"	14 days	9-9-74	to	22-9-74
"	2 days	5-11-74	to	6-11-74
"	7 days	26-11-74	to	1-12-74
"	7 days	17-2-75	to	23-2-75
"	2 days	21-7-75	to	22-7-75
"	7 days	15-9-75	to	21-9-75
"	2 days	17-11-75	to	18-11-75

4. At this juncture, it would be convenient to make reference to a certificate given by the Assistant Manager of Messrs. Mackinnon Mackenzie Private Limited and which was forwarded by the petitioner to the Corporation in pursuance of the demand made by the Corporation. The certificate sets out the sick leave obtained by the deceased while in employment and it would be convenient to set out the relevant portion of the certificate:

Pain on a/c.	***Medical certificate***	***Pain on a/c.***	***Medical certificate***
Piles	produced	Fever	produced
Hypertension	Yes	Influenza	Yes
Influenza	Yes	Influenza	Yes
Dysentery	Yes	Diarrhoea	Yes

Influenza	Yes	Sprain in leg	Yes
Influenza	Yes	Fever	Yes

For privilege leave, staff is not required to submit any reasons. Casual leave and privilege leave are not granted when the staff becomes sick. They take sick leave as per the Company's rules".

As the appeals made by the petitioner for grant of the amount under the policy fell on the deaf ears, the petitioner was driven to file the present petition under Art. 226 of the Constitution of India in this Court on April 19, 1980 for writ of mandamus directing the respondents to pay the petitioner the amount due under the Policy including all the benefits and bonuses accruing thereon.

5. In an answer to the petition, the respondents filed a return dt. July 31, 1980 sworn by Naresh Chander Gautam, Administrative Officer of the Corporation. The Corporation claims that the dispute pertains to contractual obligations and as such a right cannot be enforced in the writ petition. It is claimed that it would be a gross abuse to issue a high prerogative writ as claimed by the petitioner. It is further claimed that the remedy of the petitioner is to file a suit. On merits, it is claimed that the Corporation was perfectly justified in repudiating the contract as the deceased had made false statements as regards his health and in case the deceased had disclosed the correct facts of his ailments at the time of submitting the proposal papers, then the Corporation would not have entered on the risk. The Corporation further pleads that although the Corporation had in its possession undisputable evidence to hold that the deceased made false and inaccurate statements, the Corporation is not willing to give inspection of the evidence in its possession because it is extremely dangerous to disclose such evidence as it could be spirited away or destroyed. The Corporation declines to produce the evidence even in this petition and claims that the same would be produced from the proper custody when evidence is led in a suit, which the petitioner should file. The Corporation, therefore, claims that the petition should be dismissed with costs.

6. Mrs. Singhvi, learned counsel appearing on behalf of the petitioner, submitted that the entire conduct of the Corporation, right from the inception till the hearing of the petition, smacks of high-handedness and the public body like the Corporation should not indulge in raising false defences and defeating the claim of an unfortunate young widow with three minor children. The learned counsel urged that it is a common knowledge that while submitting the proposal, the insured does not refer to the trivial or minor ailments and it is futile on the part of the Corporation to claim that the amount under the policy cannot be claimed by the petitioner and the Corporation can repudiate the contract merely on the ground that the Corporation finds some material which possibly might indicate that the statements were inaccurate. Mrs. Singhvi submits, and in my judgment with considerable merit, that the mere fact that the sick leave was obtained by the deceased by producing medical certificate cannot lead to the conclusion that the deceased was suffering from serious ailments and such ailments would have reduced his life span. It was also urged that the deceased died due to accidental fire and the ailment, which the Corporation claims the deceased was suffering, had no nexus to the death of the husband of the petitioner. Mrs. Singhvi placed strong reliance upon S. 45 of the Insurance Act, which, inter alia, provides that the Policy cannot be called in question on the ground of mis-statement after two years. Shri Taleyarkhan, learned counsel

appearing on behalf of the Corporation, on the other hand, submitted that the basis of the contract is the statement made by the insured and once it is found that the statements were not correct, then the contract is void and the Corporation is perfectly justified in repudiating the same. Shri Taleyarkhan places strong reliance upon the declaration made by the insured at the time of submitting the proposal form.

7. The first submission of Shri Taleyarkhan that it would be a gross abuse to issue a writ in favour of the petitioner is required to be repelled with the contempt it deserves. The Life Insurance Corporation is a public body and it is regrettable that such contentions are raised to defeat the claim of a poor widow. It has been repeatedly pointed out that the writ jurisdiction is exercised by the Courts for advancing the cause of justice and the public body like the Corporation should not raise frivolous defence to defeat the claim of a citizen on technical consideration. The contention that the dispute pertains to contractual obligations and, therefore, the petitioner should be driven to file a suit is repeatedly raised by the public Corporations and it would be advantageous to refer to certain observations of the Supreme Court in the case of ***Gujarat State Financial Corporation*** **v.** ***Lotus Hotels Pvt. Ltd.*** [AIR 1983 SC 848]. Shri Justic Desai speaking for the Bench observed (at p. 851):

> "It is next contended that the dispute between the parties is in the realm of contract and even if there was a concluded contract between the parties about grant and acceptance of loan, the failure of the Corporation to carry out its part, of the obligation may amount to breach of contract for which a remedy lies elsewhere but a writ of mandamus cannot be issued compelling the Corporation to specifically perform the contract. It is too late in the day to contend that the instrumentality of the State which would be 'other authority' under Art. 12 of the Constitution can commit breach of a solemn undertaking on which other side has acted and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of the contract".

8. In spite of the dictum laid down by the Supreme Court on more than one occasion, it is unfortunate that the Corporation should raise such defense to refuse the claim. It is high time that the Corporation should mend its ways and desist from raising such technical contentions and wasting the time of the Court. The contention of the Corporation that the grant of relief to the petitioner would be a gross abuse of the powers is entirely misconceived. The Corporation may very well choose to deny the relief to the citizen and defeat the justice, but in my judgment, the refusal of the Corporation to pay a pittance of an amount to the widow is, in fact, the gross abuse of the powers.

9. Shri Taleyarkhan submitted that the printed form of proposal contains a declaration of the proposal and it reads as under:-

> "I, Shri Anandrao Talpade the person, whose life is hereinbefore proposed to be assured, do hereby declare that the foregoing statements and answers are true in every particular and agree and declare that those statements and this declaration along with the further statements made or to be made before the Medical Examiner and the declaration relative thereto shall be the basis of the contract of assurance between me and the Life Insurance Corporation of India and that if any untrue

averment be contained therein the said contract shall be absolutely null and void and all moneys which shall have been paid in respect thereof shall stand forfeited to the Corporation."

The learned counsel urged that the contract between the Corporation and the deceased husband makes it clear that if any untrue averments are contained in the proposal, then the contract should be absolutely null and void and the amount of premium can be forfeited. It was urged that the deceased husband of the petitioner had made false statement as regards his health and before considering whether any such false statements were at all made, it would be appropriate to make reference to S. 45 of the Insurance Act, 1938. Section 43 of the Life Insurance Corporation of India Act, 1956, inter alia, provides that S. 45 of the Insurance Act shall apply to the Corporation as it applies to any other insurer Shri Taleyarkhan did not dispute that under the provisions of S. 45 of the Insurance Act, it is not open for the Corporation to question any policy on the ground that the statement made in the proposal was inaccurate or false. Shri Taleyarkhan submits that the Corporation can repudiate the policy provided it is shown that such statement by the policyholder was on a material matter and was fraudulently made. It is obvious that in view of the statutory provisions of S. 45 of the Insurance Act, it is not permissible for the Corporation to repudiate the policy merely on the ground that an inaccurate or false statement was made by the policy-holder at the time of taking out the policy. The power of the Corporation is repudiate the contract comes to an end after the expiry of two years from the date of commencement of the policy. The policy was taken out by the deceased husband of the petitioner on July 7, 1975 and the deceased died after the passage of two years from the date and obviously the provisions of S. 45 of the Insurance Act come into play.

10. The Supreme Court considered the ambit of S. 45 of the Insurance Act in ***Mithoolal Nayak* v. *Life Insurance Corporation of India*** [AIR 1962 SC 814] and laid down that the three conditions for the application of the second part of S. 43 are:

(a) the statement must be on a material matter or must suppress facts which it was material to disclose,
(b) the suppression must be fraudulently made by the policy holder, and
(c) the policy holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose.

It is necessary now to ascertain whether the deceased made any inaccurate or false statement in the proposal submitted to the Corporation and even assuming that such statement was made whether the second part of S. 45 of the Insurance Act has application to the facts of the case. Column 4 of the proposal form requires the deceased to state what is the usual state of his health and the deceased had answered that it was good. The deceased had also answered that he had not consulted the Medical Practitioner within the last five years prior to the date of making the proposal. The deceased had also stated in Col. 8 that he had not remained absent from the work on the ground of health during previous two years. The Corporation claims that all these statements were false or inaccurate and in support of the claim, the sole reliance by Shri Taleyarkhan is on the certificate issued by the employer and forwarded by the petitioner to the Corporation. It was urged that the certificate sets out in detail the ailments suffered by the deceased from April 14, 1972 onwards till Nov. 18, 1975

and the sick leave secured by the deceased from his office. Shri Taleyarkhan submits that the deceased had taken sick leave on production of medical certificate and that clearly establishes that the deceased was suffering from ailment and had consulted Medical Practitioner. It is impossible to accept the contention of Shri Taleyarkhan that the deceased had made deliberate false statements. In the first instance, it must be remembered that before the Corporation accepted the proposal of the deceased, a confidential report of the Medical Examiner was secured by the Corporation. The Medical Officer, Dr. Sahil Dipchand, is a Doctorate in Medicine and is attached to the General Hospital at Borivli and is on the panel of the Corporation.The confidential report submitted by the Medical Examiner was made available by Shri Taleyarkhan after I called upon the learned counsel to produce the original and the report unmistakably establishes that the deceased was enjoying sound health. The report was made by the Medical Examiner after examining the deceased thoroughly and it is obvious that the Corporation has not proceeded to accept the proposal of the deceased only on the statements made in the printed form but on the basis of the report received from the Medical Officer. Secondly, the deceased had disclosed in the proposal form that he was operated for appendicitis in the year 1959 and had not hidden the fact of operation from the Corporation. What is urged by Shri Taleyarkhan is that the deceased did not disclose that he was suffering from bleeding piles, hypertension and influenza.

11. Now, even assuming that the certificate issued by the employer is correct and the deceased had in fact secured sick leave on the relevant dates by production of Medical Certificate, it cannot be concluded that the deceased was in fact suffering from the bleeding piles or hypertension. In my judgment, the ailment of bleeding piles, influenza and dysentery are very minor and trivial ailments and the failure to disclose such ailments in the proposal form cannot be treated as a suppression of the relevant particulars. The deceased might have very well felt that it is not necessary to state that he had suffered from flue, dysentery or common cold because such ailment has no bearing whatsoever to the longevity of the person. It is well known that people in Bombay do not consult Medical Practitioners for such petty ailments like flue, fever or dysentery but the medical certificates are required to be produced before the employer in accordance with the service conditions and the mere fact that the medical certificate is produced for obtaining sick-leave cannot lead to the conclusion that the deceased had taken treatment from the Medical Practitioner.Shri Taleyarkhan made reference to paragraph 11 of the return wherein it is claimed that the deceased was suffering from low blood pressure, giddiness and weakness in Dec. 1972 .There is no material on record whatsoever to substantiate this claim. The reliance on the certificate issued by the employer would not help the Corporation because the medical certificate issued in Dec. 1972 merely recites that the deceased was suffering from hypertension. It nowhere refers to the deceased suffering from giddiness or blood pressure or weakness. The certificate discloses only one occasion in 1972 when leave was secured on ground of hypertension and piles. The Corporation has stoutly claimed that it is not bound to produce any material which it holds in support of the claim that the deceased had made false and inaccurate statements and the excuse given for such non-production of evidence is that the disclosure may lead to the destruction or spiriting away of the said material. The Corporation cannot take shield behind such vague excuses and sustain its claim that it holds undisputable evidence in its custody. It is obvious that the Corporation has no material in its custody save and except the certificate

issued by the employer of the deceased. The action of the Corporation in concluding from that certificate that the deceased was suffering from serious ailments or illness and thereby repudiating the contract is wholly illegal. The Corporation has raised false bogie of inaccurate statements only to defeat the just claim of the poor widow and the action of the Corporation deserves to be deplored.

12. Even assuming that the deceased had made incorrect or false statements about his ailment, still that fact itself would not be suffice for the Corporation to repudiate the contract in view of the clear-cut provisions of S. 45 of the Insurance Act. Realizing this position, Shri Taleyarkhan urged that the suppression of ailment was a material matter and the deceased suppressed that fact fraudulently. It was urged that the deceased knew at the time of making the statement that it was false and, therefore, it is open for the Corporation to repudiate the contract. In my judgment, the submission is entirely misconceived. In the first instance, there was no suppression whatsoever by the deceased. It was not necessary for the deceased to disclose trivial ailments like fever, flu or dysentery. There is nothing to warrant the conclusion that the deceased had consulted Medical Practitioner within five years prior to the taking out of the Policy. The concept of consultation with the Medical Practitioner is entirely different from securing medical certificate on the ground that the person is down with fever. The perusal of the proposal form leaves no manner of doubt that it is not each and every petty ailment which has to be disclosed by the proposor and what it required to be disclosed is a serious ailment. The deceased was not suffering from any serious ailment and was a young man of 41 years age at the time of taking out of the policy. The Medical Practitioner on the panel of the Corporation had examined him and in these circumstances, it is futile for the Corporation to claim that the deceased was suffering from any serious ailment. In my judgment, the non-disclosure of the fact that the deceased was suffering from fever or down with flue on some occasions is not material matter and, therefore, the failure to disclose the same cannot be construed as suppression of the relevant fact. As laid down by the Supreme Court, it is not suppression of the fact which is sufficient to attract second part of S. 45 of the Insurance Act but what is required is that such suppression should be fraudulently made by the policyholder. The expression “fraudulently” connotes deliberate and intentional falsehood or suppression and some strong material is required before concluding that the policyholder had played a fraud on the Corporation. In my judgment on the facts and circumstances of the present case, it is impossible to come to the conclusion that the deceased had suppressed any material facts and such suppression was done fraudulently. The Corporation cannot deny its liability by a raising hopeless defence that the deceased was suffering from fever, flu and dysentery from time to time. In my judgment, the second part of S. 45 of the Insurance Act is not, at all, attracted to the facts of the case and it is not open for the Corporation to repudiate the contract. The petitioner is entitled to the claim under the policy along with the bonuses and other benefits accrued thereon.

13. In my judgment, the request made by the learned counsel is correct and deserves acceptance. The petitioner husband died on Oct. 8, 1977 and the claim was lodged by the petitioner on Oct. 24, 1977. The Corporation raised false and frivolous pleas to deny the claim of the petitioner who has deprived the petitioner of a small amount though it is quite large to the petitioner, what I am told, is serving as a maid servant to bear up her three minor

children. The Corporation has enjoyed the advantage of the amount which was due to the petitioner and the Corporation is duty bound to pay the said amount with interest to the petitioner who was deprived her just dues. In my judgment, the Corporation should pay the amount due under the policy along with interest at the rate of 15% from the date of lodging of the claim i.e. Oct. 24, 1977 till payment. The Corporation has not only denied payment to the petitioner but has also raised frivolous pleas in answer to the petition and has persisted in defending the petition without any just reasons. In my judgment, this is a fit case to award compensatory costs of Rs. 1,000/- to the petitioner in addition to the normal costs.

14. Accordingly, rule is made absolute and the respondents are directed to pay to the petitioner the amount due under Policy No. 18251483 issued on July 7, 1975 including all the bonuses and other benefits accrued thereon.

* * * * *

LIC of India v. *Smt. G.M. Channabasamma*

(1991) 1 SCC 357

L.M. SHARMA, J. - This appeal by special leave arises out of a suit filed by the plaintiff-respondent for a money decree for a sum of Rs 77,805.85 being the amount due for four insurance policies held by her deceased husband. The defendant-appellant Life Insurance Corporation denied the claim on the plea that the deceased, while filling up the proposal forms for the policies, was guilty of fraudulent misrepresentations and suppression of material facts with regard to his health. The trial court accepted the defence and dismissed the suit. On appeal by the plaintiff, the High Court reversed the decision and passed a decree.

2. The deceased husband of the plaintiff was described in the policies as T.R. Gurupadaiah but in the plaint his name has been mentioned as Gurupadappa. However, since in our view the correct spelling of the name is not material for purposes of the present case, it is not necessary to give further details in regard to the difference in the two names. We agree with the Corporation that the correct name was Gurupadaiah and since the policies under which the claim in the suit has been made bear the said name, it is immaterial if he was also known by a slightly different name. After the receipt of the claim from the plaintiff, the Corporation, feeling suspicious, made an inquiry through its Administrative Officer Sri V.V. Narasimhan (DW 11) who according to the defence collected sufficient material to establish fraudulent misrepresentation and suppression of material facts by the insured at the time of taking out the policies. The insured died on October 14, 1961 in a hospital for tubercular patients. According to the case of the Corporation the deceased was suffering from acute diabetes and diseased of the lungs of which he was fully aware at the time of taking out the policies in question, and fraudulently denied the same in the proposal forms.

3. The four policies were respectively taken out for Rs 20,000 on July 30, 1959, for Rs 20,000 on July 16, 1960, for Rs 10,000 on July 16, 1960 and for Rs 25,000 on August 23, 1961. It has been contended by the learned counsel for the appellant that since the last policy was of a date only about two months before the death of the insured it cannot be believed that he did not know about his illness. Even the earlier three policies had been taken out only a short time earlier, and having regard to the nature of the diseases it must be assumed that the insured was fraudulently suppressing the relevant fact. The questions on the proposal forms which the insured had to fill up have been placed before us and it has been argued that several answers submitted by the insured were definitely false to his own knowledge. It was claimed that the Administrative Officer of the Corporation was, on inquiry, informed by several doctors about the chronic illness of the insured and this information was corroborated by documentary evidence.

4. The learned counsel of the respondent has contended that it is true that her husband died of tuberculosis but he nor any member of the family had any knowledge of his illness at the time of taking out the policies. He was keeping good health and actively taking part in his business and the discovery of the disease which accounted for his early demise was made very late. The allegations of fraudulent misrepresentation and suppression of material facts made in the written statement were emphatically denied on behalf of the plaintiff at the trial. The trial court, however, accepted the defence and dismissed the suit.

5. On appeal the High Court, on a consideration of the evidence led by the parties and the arguments addressed on their behalf, held that the defendant had failed to prove that the insured was suffering from diabetes or tuberculosis at the time of filling of the proposals for the insurance policies or that he had given any false answer in his statements or suppressed any material fact which he was under a duty to disclose. The finding of the trial court that the assured had committed fraud on the defendant Corporation in taking out the policies was reversed. In the result, the appeal was allowed and the suit was decreed. This decision is under challenge in the present appeal by special leave.

6. Mr Vasudev, appearing in support of the appeal, has strenuously contended that in view of the evidence on the record and the circumstances, the findings of the High Court are erroneous and fit to be set aside. He has emphasised the fact that the policies in question were taken within a short span of time and that the insured died only about two months from the last policy. The argument is that the evidence of the witnesses examined on behalf of the defendant is fit to be accepted as reliable and is adequate to prove the defence case. We have gone through the entire evidence in this case with the learned counsel for the parties, and do not find ourselves in a position to take a view different from that of the High Court. Since we concur with the impugned judgment, it is not necessary to deal with the evidence at great length. We, however, proceed to briefly indicate our reasons.

7. The principle as to when an insurer can validly repudiate a contract of insurance on the ground of misrepresentation or suppression of material facts is not in controversy in the present appeal. Mr Vasudev, the learned counsel for the appellant has, however, placed a number of decisions both English and Indian dealing with this aspect, but we do not consider it necessary to discuss them here. It is well settled that a contract of insurance is contract *uberrima fides* and there must be complete good faith on the part of the assured. The assured is thus under a solemn obligation to make full disclosure of material facts which may be relevant for the insurer to take into account while deciding whether the proposal should be accepted or not. While making a disclosure of the relevant facts, the duty of the insured to state them correctly cannot be diluted. Section 45 of the Act has made special provisions for a life insurance policy if it is called in question by the insurer after the expiry of two years from the date on which it was affected. Having regard to the facts of the present case, learned counsel for the parties have rightly stated that this distinction is not material in the present appeal. If the allegations of fact made on behalf of the appellant Company are found to be correct, all the three conditions mentioned in the section and discussed in ***Mithoolal Nayak* v. *Life Insurance Corporation of India*** [AIR 1962 SC 814] must be held to have been satisfied. We must, therefore, proceed to examine the evidence led by the parties in the case.

8. The burden of providing that the insured had made false representations and suppressed material facts is undoubtedly on the Corporation. According to Mr Vasudev the defence has discharged its duty by examining a number of doctors to establish that the insured was, at the time of taking out the policies, suffering from diabetes and other diseases. The appellant has heavily relied upon the evidence of DW 4 Dr M.S. Kumar, who has deposed that he was giving Gurupadaiah injections of insulin, anacobia and vetabion and was also examining his urine daily which contained sugar. The witness has been disbelieved by the High Court on the ground of his enmity with Gurupadaiah's father-in-law G.B.

Mallikarjunaih. In his statement before the court in September 1966 he claimed to have treated Gurupadaiah from 1953 to 1957. He was charging fee for his services but on a concessional rate as he was a tenant in the house belonging to Mallikarjunaih. According to the plaintiff's case, certain dispute had arisen between the two which ultimately led to Dr Kumar's vacating the house in 1959. The witness has denied the dispute but has admitted the tenancy and the fact that he left the house in 1959. In support of his claim to have treated the insured, he produced a chit Ex. D-33, containing an account of the payments from patients. The document is a single loose sheet of paper containing the accounts of 8 patients out of whom only Gurupadaiah's name finds place therein. No other patient's name is mentioned in the slip. The witness has not offered any explanation for this exceptional treatment given to Gurupadaiah in mentioning his name in Ex. D-33. There is also an obvious discrepancy in the sheet with respect to the dates which the witness has explained by saying that it was a mistake. According to his further evidence Gurupadaiah again contacted him in 1960, but he has not produced any document similar to Ex. D-33. In answer to a question as to why he had struck off some other name at the top of Ex. D-33 and had written the name of Mallikarjunaih, Dr Kumar stated that he did so as at that time he might not have any other paper with him. Having regard to all the circumstances pointed out by the High Court, we agree with its conclusion that the evidence of DW 4 cannot be relied upon for holding that Gurupadaiah was under his treatment in 1957, 1960 or at any point of time.

9. Another medical practitioner Dr H.N. Gangadhar was examined as DW 2. He was the family doctor of Mallikarjuniah and denied that Gurupadaiah was his patient. He, however, stated that he had given to Gurupadaiah two injections of anacobin in October 1958 and another in November 1958. According to his evidence anacobin injections are harmless and can be given even to healthy men as tonic; and generally they are given for general weakness, ananemia, sprain and a number of other diseases including diabetes. There is no reason to disbelieve Dr Gangadhar. But his evidence does not take us beyond showing that the insured had taken in 1958 three injections of anacobin which, according to the doctor's evidence, does not lead to any conclusion about the disease. The next witness Dr Siddalingaih DW 3 was working in the T.B. Hospital, Tumkur, where Gurupadaiah was admitted as an indoor patient with severe cough trouble and chest pain. The doctor was an LMP, but did not hold any special diploma for treatment of tuberculosis. According to the witness, Gurupadaiah had lost weight and was weak and died there on October 14, 1961. Having regard to the condition of the patient, the doctor opined that he might have been ill for more than six months before his admission in the hospital. He, however, accepted in cross-examination that if a man is weak and not in a position to resist infection from outside, galloping tuberculosis may attack him, and in such a case the duration for the symptoms to come out may be from a month to three months. His evidence also does not necessarily lead to the conclusion that Gurupadaiah was inflicted by a serious disease for a long time.

10. According to the evidence of three other doctors DW 5, DW 6 and DW 10, they had examined and treated a person bearing the name Gurupadayya or Gurupadaiah or Gurupadappa. But none of them is in a position to say that it was the same person as the deceased husband of the present plaintiff. They are not in a position to indicate anything whereby the identity of the patient can be proved or inferred. There is no mention of the

father's name or residence of the patient and their depositions can be of evidentiary value only if the statement of Dr Kumar DW 4 is accepted. If the evidence of DW 4 is rejected, as we have already done, the evidence of the other three doctors by themselves is not of any help. As against this, the evidence of the Corporation's doctors who had certified the good health of the insured at the time of taking out the insurance policies and who have been examined as defence witnesses disproves the case of illness. It has not been suggested that these doctors were either won over by the insured or were negligent in performing their duty. They had submitted confidential reports about the health of the insured and were of the opinion that he was in good health. We, therefore, agree with the High Court that the defendant Corporation has failed to discharge the burden of proving the defence story about the serious illness of the insured at the time of taking out the insurance policies and knowingly suppressing the material information.

11. Before concluding we would like to say a few words about the role of V.V. Narsimhan, DW 11, who was the Administrative Officer of the Corporation and was in charge of the investigation of the death claims. The learned counsel for the appellant has contended that certain observations in the judgment of the High Court amount to a criticism of the Administrative Officer. We do not think that the observations can be described as strictures, but, in any event, we would like to clarify the position that in our view no exception can be taken against the conduct of the officer in the matter of investigation of the present case. He was under a duty to have made a thorough inquiry in the circumstances, which certainly on the face appeared to be suspicious, and he was performing his duty with all seriousness as he ought to have done.For the reasons mentioned above, the appeal is dismissed.

* * * * *

Life Insurance Corporation of India v. *Asha Goel*

(2001) 2 SCC 160 : AIR 2001 SC 549

D.P. MOHAPATRA, J. - These appeals, filed by Life Insurance Corporation of India ("the Corporation"), are directed against the judgment of a Division Bench of the Bombay High Court in Writ Appeal No. 843 of 1985 allowing the appeal on the ground that the appellant should have had an opportunity of leading evidence relevant to their contention that the insurance policy was obtained by misrepresentation, and therefore, avoidable at the instance of the Corporation, and remitting the writ petition to the writ court for fresh decision after allowing the Corporation to lead evidence. The Division Bench did not accept the objection raised by the Corporation against maintainability of the writ petition on the ground that the case involves enforcement of contractual rights for adjudication of which a proceeding under Article 226 of the Constitution is not the proper forum. The contention on behalf of the Corporation was that the writ petition should be dismissed as not maintainable leaving it to the writ petitioner, Respondent 1 herein, to file a civil suit for enforcement of her claim.

2. Late Naval Kishore Goel, husband of Smt Asha Goel - Respondent 1, was an employee of M/s Digvijay Woollen Mills Limited at Jamnagar as a Labour Officer. He submitted a proposal for a life insurance policy at Meerut in the State of U.P. on 29-5-1979 which was accepted and the policy bearing No. 48264637 for a sum of Rs 1,00,000 (Rs one lakh) was issued by the Corporation in his favour. The insured passed away on 12-12-1980 at the age of 46 leaving behind his wife, a daughter and a son. The cause of death was certified as acute myocardial infarction and cardiac arrest. Respondent 1 being nominee of the deceased under the policy informed the Divisional Manager, Meerut City, about the death of her husband, submitted the claim along with other papers as instructed by the Divisional Manager and requested for consideration of her claim and for making payment. The Divisional Manager by his letter dated 8-6-1981 repudiated any liability under the policy and refused to make any payment on the ground that the deceased had withheld correct information regarding his health at the time of effecting the insurance with the Corporation. The Divisional Manager drew the attention of the claimant that at the time of submitting the proposal for insurance on 29-5-1979 the deceased had stated his usual state of health as good; that he had not consulted a medical petitioner within the last five years for any ailment requiring treatment for more than a week; and had answered the question if remained absent from place of your work on ground of health during the last five years in the negative. According to the Divisional Manager, the answers given by the deceased as aforementioned were false. Since Respondent 1 failed to get any relief from the authorities of the Corporation despite best efforts, she filed the writ petition seeking a writ of mandamus directing the Corporation and its officers to pay the sum assured and other accruing benefits with interest.

10. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue high prerogative writs for enforcement of the fundamental rights or for any other purpose. It is wide and expansive. The Constitution does not place any fetter on exercise of the extraordinary jurisdiction. It is left to the discretion of the High Court. Therefore, it cannot be laid down as a general proposition of law that in no case the High Court can

entertain a writ petition under Article 226 of the Constitution to enforce a claim under a life insurance policy. It is neither possible nor proper to enumerate exhaustively the circumstances in which such a claim can or cannot be enforced by filing a writ petition. The determination of the question depends on consideration of several factors like, whether a writ petitioner is merely attempting to enforce his/her contractual rights or the case raises important questions of law and constitutional issues, the nature of the dispute raised; the nature of inquiry necessary for determination of the dispute etc. The matter is to be considered in the facts and circumstances of each case. While the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution cannot be denied altogether, courts must bear in mind the self-imposed restriction consistently followed by High Courts all these years after the constitutional power came into existence in not entertaining writ petitions filed for enforcement of purely contractual rights and obligations which involve disputed questions of facts. The courts have consistently taken the view that in a case where for determination of the dispute raised, it is necessary to inquire into facts for determination of which it may become necessary to record oral evidence a proceeding under Article 226 of the Constitution, is not the appropriate forum. The position is also well settled that if the contract entered between the parties provide an alternate forum for resolution of disputes arising from the contract, then the parties should approach the forum agreed by them and the High Court in writ jurisdiction should not permit them to bypass the agreed forum of dispute resolution. At the cost of repetition it may be stated that in the above discussions we have only indicated some of the circumstances in which the High Court have declined to entertain petitions filed under Article 226 of the Constitution for enforcement of contractual rights and obligation; the discussions are not intended to be exhaustive. This Court from time to time disapproved of a High Court entertaining a petition under Article 226 of the Constitution in matters of enforcement of contractual rights and obligation particularly where the claim by one party is contested by the other and adjudication of the dispute requires inquiry into facts.

11. The position that emerges from the discussions in the decided cases is that ordinarily the High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed, the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable. It has also to be kept in mind that in case an insured or nominee of the deceased insured is refused relief merely on the ground that the claim relates to contractual rights and obligations and he/she is driven to a long-drawn litigation in the civil court it will cause serious prejudice to the claimant/other beneficiaries of the policy. The pros and cons of the matter in the context of the fact-situation of the case should be carefully weighed and appropriate decision should be taken. In a case where claim by an insured or a nominee is repudiated raising a serious dispute and the Court finds the dispute to be a bona fide one which requires oral and documentary evidence for its determination then the appropriate remedy is a civil suit and not a writ petition under Article 226 of the Constitution. Similarly, where a plea of fraud is pleaded by the insurer and on examination is found prima facie to

have merit and oral and documentary evidence may become necessary for determination of the issue raised, then a writ petition is not an appropriate remedy.

12. Coming to the question of scope of repudiation of claim of the insured or nominee by the Corporation, the provisions of Section 45 of the Insurance Act is of relevance in the matter. The section provides, inter alia, that no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose. The proviso which deals with proof of age of the insured is not relevant for the purpose of the present proceeding. On a fair reading of the section it is clear that it is restrictive in nature. It lays down three conditions for applicability of the second part of the section namely: (*a*) the statement must be on a material matter or must suppress facts which it was material to disclose; (*b*) the suppression must be fraudulently made by the policy-holder; and (*c*) the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose. Mere inaccuracy or falsity in respect of some recitals or items in the proposal is not sufficient. The burden of proof is on the insurer to establish these circumstances and unless the insurer is able to do so there is no question of the policy being avoided on ground of misstatement of facts. The contracts of insurance including the contract of life assurance are contracts uberrima fides and every fact of material (*sic* material fact) must be disclosed, otherwise, there is good ground for rescission of the contract. The duty to disclose material facts continues right up to the conclusion of the contract and also implies any material alteration in the character of the risk which may take place between the proposal and its acceptance. If there are any misstatements or suppression of material facts, the policy can be called into question. For determination of the question whether there has been suppression of any material facts it may be necessary to also examine whether the suppression relates to a fact which is in the exclusive knowledge of the person intending to take the policy and it could not be ascertained by reasonable enquiry by a prudent person.

15. Life Insurance Corporation was created by the Life Insurance Corporation Act, 1956 with a view to provide for nationalisation of life insurance business in India by transferring all such business to a corporation established for the purpose and to provide for the regulation and control of the business of the Corporation and for matters connected therewith or incidental thereto. The said Act contains various provisions regarding establishment of Life Insurance Corporation of India; the functions of the Corporation, the transfer of existing life insurance business to the Corporation, the management of the establishment of the Corporation, the finance, accounts and audit of the Corporation and certain other related matters. Section 30 of the Act provides that except to the extent otherwise expressly provided in this Act, on and from the appointed day the Corporation shall have the exclusive privilege of carrying on life insurance business in India; and on and from the said day any certificate of

registration under the Insurance Act held by any insurer immediately before the said day shall cease to have effect insofar as it authorises him to carry on life insurance business in India.

16. In course of time the Corporation has grown in size and at present it is one of the largest public sector financial undertakings. The public in general and crores of policy-holders in particular, look forward to prompt and efficient service from the Corporation. Therefore, the authorities in charge of management of the affairs of the Corporation should bear in mind that its credibility and reputation depend on its prompt and efficient service. Therefore, the approach of the Corporation in the matter of repudiation of a policy admittedly issued by it, should be one of extreme care and caution. It should not be dealt with in a mechanical and routine manner.

17. With the above discussions and observations regarding the questions raised before us, we dispose of the appeals with the direction that the sum, as directed by the learned Single Judge in favour of the claimant, will be paid by the Corporation expeditiously, if it has not already been paid. In view of the above order/direction, it is not necessary to proceed with the case pending before the High Court any further.

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New India Assurance Company Ltd. v. *M/s. Zuari industries Ltd.*

(2009) 9 SCC 70

MARKANDEY KATJU, J. - This appeal has been filed against the impugned judgment of the National Consumer Disputes Redressal Commission, New Delhi dated 26.3.2004 in Original Petition No.196 of 2001.

3. The facts of the case were that the complainant (respondent in this appeal) had taken Insurance Policies from the appellant on 1.4.1998 in respect of its factory situated in Jauhri Nagar, Goa.

One policy was a fire policy and the other was a consequential loss due to fire policy.

4. On 8.1.1999 at about 3.20 p.m. there was a short circuiting in the main switch board installed in the sub-station receiving electricity from the State Electricity Board, which resulted in a flashover producing over currents. The flashover and over currents generated excessive heat. The paint on the panel board was charred by this excessive heat producing smoke and soot and the partition of the adjoining feeder developed a hole. The smoke /soot along with the ionized air traveled to the generator compartment where also there was short circuiting and the generator power also tripped. As a result, the entire electric supply to the plant stopped and due to the stoppage of electric supply, the supply of water/steam to the waste heat boiler by the flue gases at high temperature continued to be fed into the boiler, which resulted in damage to the boiler.

5. As a result the respondent - complainant approached the Insurance Company informing it about the accident and making its claim. Surveyors were appointed who submitted their report but the appellant-Insurance Company vide letter dated 4.9.2000 rejected the claim. Hence the petition before the National Commission.

6. The claimant-respondent made two claims (i) Rs.1,35,17,709/- for material loss due to the damage to the boiler and other equipments and (ii) Rs.19,11,10,000/- in respect of loss of profit for the period the plant remained closed.

7. The stand of the appellant- Insurance Company was that the loss to the boiler and other equipments was not caused by the fire, but by the stoppage of electric supply due to the short circuiting in the switch board. It was submitted that the cause of the loss to the boiler and the equipments was the thermal shock caused due to stoppage of electricity and not due to any fire. It was submitted that the proximate cause has to be seen for settling an insurance claim, which in the present case, was the thermal shock caused due to stoppage of electricity. However, the National Commission allowed the claim of the respondent and hence this appeal.

8. Ms. Meenakshi Midha who argued this case with great ability submitted that the loss to the boiler and to the equipments did not occur due to any fire. Hence she submitted that the claim of damages did not fall under the cover of the Insurance Policy. She submitted that for a claim relating to fire insurance policy to succeed it is necessary that there must be a fire in the first place. In the absence of fire the claim cannot succeed. She submitted that in the

present case (1) there was no fire and (2) in any case it was not the proximate cause of the damage.

9. On the other hand, Shri K.K. Venugopal, learned senior counsel, supported the judgment of the National Commission and stated that the judgment was correct.

10. We have therefore to first determine whether there was a fire. Admittedly there was a short circuit which caused a flashover.

11.. Wikipedia defines flashover as follows :

> "A flashover is the near simultaneous ignition of all combustible material in an enclosed area. When certain materials are heated they undergo thermal decomposition and release flammable gases. Flashover occurs when the majority of surface in a space is heated to the autoignition temperature of the flammable gases."

12. In this connection, it is admitted that the short circuit in the main switch board caused a flashover. The surveyor Shri M.N. Khandeparkar in his report has observed :

> "Flashover, can be defined as a phenomenon of a developing fire (or radiant heat source) radiant energy at wall and ceiling surfaces within a compartment…. In the present case, the paint had burnt due to the said flashover … Such high energy levels, would undoubtedly, have resulted in a fire, causing melting of the panel board…."

13. The other surveyor P.C. Gandhi Associates has stated that "Fire of such a short duration cannot be called a `sustained fire' as contemplated under the policy".

14. In our opinion the duration of the fire is not relevant. As long as there is a fire which caused the damage the claim is maintainable, even if the fire is for a fraction of a second. The term `Fire' in clause (1) of the Fire Policy `C' is not qualified by the word 'sustained'. It is well settled that the Court cannot add words to statute or to a document and must read it as it is. Hence repudiation of the policy on the ground that there was no `sustained fire' in our opinion is not justified.

15. We have perused the fire policy in question which is annexure P-1 to this appeal. The word used therein is 'fire' and not 'sustained fire'. Hence the stand of the Insurance Company in this connection is not acceptable.

16. Shri K.K. Venugopal invited our attention to exclusion (g) of the Insurance Policy which stated that the insurance does not cover :

> "(g) Loss of or damage to any electrical machine, apparatus, fixture or fitting (including electric fans, electric household or domestic appliances, wireless sets, television sets and radios) or to any portion of the electrical installation, arising from or occasioned by over running, excessive pressure short circuiting, arcing self-heating or leakage of electricity from what ever cause (lightning included), provided that this exemption shall apply only to the particular electrical machine apparatus, fixtures, fittings or portion of the electrical installation so affected and not to other machines, apparatus, fixture, fittings or portion of the electrical installation which may be destroyed or damaged by fire so set up."

17. A perusal of the exclusion clause (g) shows that the main part of the exclusion clause which protects the insurer from liability under the policy covers loss of damage to any electrical machinery, apparatus, fixture or fittings including wireless sets, television sets, radio and so on which themselves are a total loss or a damage or damaged due to short circuiting, arcing, self heating or leakage of electricity. However, the proviso to the said clause through inclusion of any other machinery, apparatus, fixture or fitting being destroyed or damaged by the fire which has affected any other appliances such as television sets, radio, etc. or electrical machines or apparatus are clearly included within the scope of the Fire Policy for whatever damage or destruction caused by the fire. If for example the short circuiting results in damage in a television set through fire created by the short circuiting in it the claim for it is excluded under the fire policy. However, if from the same fire there is a damage to the rest of the house or other appliances, the same is included within the scope of the Fire Policy by virtue of the proviso. In other words, if the proximate cause of the loss or destruction to any other including other machines, apparatus, fixtures, fittings etc. or part of the electrical installation is due to the fire which is started in an electrical machine or apparatus all such losses because of the fire in other machinery or apparatus is covered by the Policy.

18. The main question before us now is whether the flashover and fire was the proximate cause of the damage in question.

19. To understand this we have to first know the necessary facts. The insurance company pointed out the chain or sequence of events as under :

> "Short-circuiting takes place in the INCOMER 2 of the main switchboard receiving electricity from the State Electricity Board possibly due to the entry of a vermin. ? Short-circuiting results in a flashover. Short-circuiting and flashover produced over-currents to the tune of 8000 amperes, which in turn produced enormous heat. The over currents and the heat produced resulted in the expansion and ionization of the surrounding air.
>
> The electricity supply from the State Electricity Board got tripped. The paint of the Panel Board charred by the enormous heat produced above and the MS partition of the adjoining feeder connected to the generator power developed a hole. It also resulted in formation of smoke/soot. The smoke/soot and the ionized air crossed over the MS partition and entered into the compartment receiving electricity from the generator.
>
> Consequently the generator power supply also got tripped. The tripping of purchased power and generator power resulted in total stoppage of electricity supply to the plant. The power failure resulted in stoppage of water/steam in the waste heat boiler. The flue gases at high temperature continued to enter the boiler, which resulted in thermal shock causing damage to the boiler tubes."

20. In this connection, it may be noted that in its written submission before the National Commission the appellant has admitted that there was a flashover and fire. The relevant portion of the written statement of the appellant before the National Commission is as follows:

(a) Para 1 of the Preliminary Objections wherein it is stated: … On 8th January, 99, there was a short circuiting… which resulted in flash over…. The cause of loss to the boiler and equipment is the thermal shock caused due to stoppage of electricity…. The stoppage of electricity was due to the fire… short circuiting results in a flash over….

(b) Para 3(iv) of the Preliminary Objections wherein it is stated: … Due to this flash over and over currents excessive heat energy was generated which resulted in the evolution of marginal fire….

(c) Para 3(vi) of the Preliminary Objections wherein it is stated: ... The surveyors observed that the experts in all the reports submitted by the complainant admitted that a flash over took place …;

(d) Para 3(viii) of the Preliminary Objections wherein it is stated: … Fire of extremely short duration followed and preceded by short circuit…;

(e) Para 7 of the reply wherein it is stated: ... It is correct that on 8th January, 1999, short circuit occurred on INCOMER-2 of the 3.3 KV main switch board in the electrical sub station which resulted in a flash over…..

(f) Para 10 of the reply wherein it is stated: … Due to this flash over and over currents excessive heat energy was generated which resulted in the evolution of marginal fire….

(g) Para 21 of the reply wherein it is stated: … A reference of fire, as opposed to sustained fire, in the opinion of M/s. P.C. Gandhi & Associates has been made…. It is in this context that M/s. P.C. Gandhi & Associates have referred to the possible fire after the flash over being of a very short duration.

21. Thus it is admitted in the written statement of the appellant before the National Commission that it was the flashover/fire which started the chain of events which resulted in the damage.

22. Apparently there is no direct decision of this Court on this point as to the meaning of proximate cause, but there are decisions of foreign Courts, and the predominant view appears to be that the proximate cause is not the cause which is nearest in time or place but the active and efficient cause that sets in motion a train or chain of events which brings about the ultimate result without the intervention of any other force working from an independent source.

23. Thus in ***Lynn Gas and Electric Company*** **v.** ***Meriden Fire Insurance Company*** [158 Mass. 570; 33 N.E. 690; 1893 Mass. LEXIS 345] Supreme Court of Massachusetts was concerned with a case where a fire occurred in the wire tower of the plaintiff's building, through which the wires of electric lighting were carried from the building. The fire was speedily extinguished, without contact with other parts of the building and contents, and with slight damage to the tower or its contents. However, in a part of the building remote from the fire and untouched thereby, there occurred a disruption by centrifugal force of the fly wheel of the engine and their pulleys connected therewith, and by this disruption the plaintiff's building and machinery were damaged to a large extent. It was held that the proximate cause was not the cause nearest in time or place, and it may operate through successive instruments,

as an article at the end of a chain may be moved by a force applied to the other end. The question always is :

Was there an unbroken connection between the wrongful act and the injury, a continuous operation? In other words, did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or there was some new and independent cause intervening between the wrong and the injury?

24. The same view was taken in ***Krenie C. Frontis et al.*** **v.** ***Milwaukee Insurance Company*** [156 Conn. 492; 242 A.2d 749; 1968 Conn. LEXIS 629]. The facts in that case were that the plaintiffs owned the northerly half of a building that shared a common wall with a factory next door. A fire broke out in the factory and damaged that building. Minimal fire damage occurred to the plaintiffs' building. However, due to the damage next door, the building inspector ordered the removal of the three upper stories of the factory building, which left the common wall insufficiently supported. Due to the safety issue, the inspector ordered the third and fourth floors of plaintiffs' building to be demolished. On this fact it was held that the fire was the active and efficient cause that set in motion a chain of events which brought about the result without the intervention of any new and independent source, and hence was the proximate cause of the damage.

25. In ***Farmers Union Mutual Insurance Company*** **v.** ***Blankenship*** [231 Ark.127; 328 S.W..2d 360; 1959 Ark. LEXIS 474; 76 A.L.R..2d 1133] the claimant's goods were damaged after a fire originated in his place of business. The goods were not damaged by the flames but by a gaseous vapour caused by the use of a fire extinguisher in an effort to put out the fire. On these facts the Supreme Court of Arkansas upheld the claim of the claimant.

26. In ***Leyland Shipping Company Limited*** **v.** ***Norwich Union Fire Insurance Society Limited*** [(1917) 1 K.B. 873] the facts of the case were that a ship was insured against perils of the sea during the first world war by a time policy containing a warranty against all consequences of hostilities. The ship was torpedoed by a German submarine twenty five miles from Havre. With the aid of tugs she was brought to Havre on the same day. A gale sprang up, causing her to bump against the quay and finally she sank. The House of Lords upheld the claim for damages observing that the torpedoing was the proximate cause of the loss even though not the last in the chain of event after which she sank.

27. In ***Yorkshire Dale Steamship Company Ltd.*** **v.** ***Minister of War Transport*** (***The Coxwold***) [(1942) AC 691 : [1942] 2 All ER 6] during the Second World War a ship in convoy was sailing carrying petrol for use of the armed forces. There was an alteration of the course of the ship to avoid enemy action, and an unexpected and unexplained tidal set carried away the ship and she was stranded at about 2.45 a.m. It was held that the loss was the direct consequence of the warlike operation on which the vessel was engaged.

28. In ***The Matter of an Arbitration between Etherington and the Lancashire and Yorkshire Accident Insurance Company*** [(1909) 1 K.B. 591] by the terms of the policy (an accident) the insurance company undertook that if the insured should sustain any bodily injury caused by violent, accidental, external and visible means, then, in case such injuries should, within three calendar months of the causing of such injury, directly cause the death of the insured, damages would be paid to his legal heirs. There was a proviso in the policy that

this policy only insured against death where the accident was the proximate cause of the death. The assured while hunting had a fall and the ground being very wet he was wetted to the skin. The effect of the shock lowered the vitality of his system and being obliged to ride home afterwards, while wet, still further lowered his vitality. As a result he developed pneumonia and died. The Court of Appeal uphold the claim holding that the accident was the proximate cause of death.

29. In the present case, it is evident from the chain of events that the fire was the efficient and active cause of the damage. Had the fire not occurred, the damage was also would not have occurred and there was no intervening agency which was an independent source of the damage.

30. Hence we cannot agree with the conclusion of the surveyors that the fire was not the cause of the damage to the machinery of the claimant.

31. Moreover, in ***General Assurance Society Ltd.*** **v.** ***Chandmull Jain*** [AIR 1966 SC 1644] it was observed by a Constitution Bench of this Court that in case of ambiguity in a contract of insurance the ambiguity should be resolved in favour of the claimant and against the insurance company.

32. Learned counsel for the appellant relied on the decision of the British High Court in ***Everett*** **v.** ***The London Assurance*** [S.C. 34 L.J.C.P. 299; 11 Jur. N.S. 546; 13 W.R. 862]. By the terms of the policy the premises in question was insured against "such loss or damage by fire to the property." It was held by the High Court that this did not cover damage resulting from the disturbance of the atmosphere by the explosion of a gunpowder magazine a mile distant from the premises insured. We are in respectful disagreement with the said judgment as the predominant view of most Courts is to the contrary.

33. For the reasons given above, we see no merit in this appeal and it is dismissed.

* * * * *

Simmonds v. *Cockell*

(1920) All ER Rep. 162

ROCHE, J. – The plaintiff sues one of the underwriting members of Lloyd's under a Lloyd's policy of insurance against burglary, housebreaking and theft, dated May 1, 1919. During the currency of the policy the premises were broken into, and about £475 worth of the plaintiff's goods were stolen. The action is brought to establish the liability of the defendant and the other underwriter of the policy. The defence is a short one, and turns on one point only - not an easy one to decide.

The policy contains the following clause: "Warranted that the premises are always occupied." I have to decide whether that warranty has been broken by the plaintiff. It is alleged that the warranty has been broken in this case, and that therefore the underwriters are not liable. The facts are that on June 22 the premises were broken into. The plaintiff and his wife, who were the only persons resident on the premises, were absent from the premises on the afternoon of the day of the burglary. The plaintiff was away partly on business, and his wife spent the afternoon at a garden party and fete, where she was joined later by the plaintiff, and they both spent the evening at the fete. During their absence the shop and premises were left unattended between 2.30 p.m. and 11.30 p.m., except for an interval about seven o'clock p.m. when the plaintiff himself returned to change his clothes. If the warranty means, as the defendant contends, that the premises are never to be left unattended, and that there must be some continuous attendance on the premises, then there has undoubtedly been a breach of the warranty for both the plaintiff and his wife were absent from the premises for some hours on the day in question. But, in my judgment, that is not the meaning of the warranty. I think it means that the premises are to be used, continuously and without interruption, for occupation, that is to say, as a residence, and not merely as a lock-up shop which is left unoccupied after business hours. That is the construction I should put on the words, and I am fortified in arriving at this conclusion by the judgment of Bray, J., in ***Winicofski* v. *Army and Navy General Assurance Association, Ltd***. [(1919) 88 J.K.B. 1171] and by the American decisions cited by counsel for the plaintiff, most of which are collected in Mr. Macgilliavray's most useful book on Insurance Law, at p. 887.

But the matter does not rest there, for if the warranty does not bear the meaning which I have given to it, I should hold, that the language used is very ambiguous; and it is a well-known principle of insurance law and other matters, that if the language of a clause drawn by a party himself for his own protection is ambiguous it must be construed against him, and if the words of a warranty in a policy are ambiguous they must be construed against the underwriter who has inserted the warranty in it for his own protection. Therefore the defence, on the whole, fails. The only materiality which attached to the question whether the plaintiff returned to the premises about seven o'clock is that it fixes the time when the burglary happened, because the premises were all right then. It was contended for the defendant that if the warranty is to be construed in a way I suggest, it affords very little protection to the underwriters. I do not agree. If the premises are used for residential as well as for business purposes, it is obvious that a thief would never know at what moment the occupier might return from a temporary absence and disturb his operations. It is that kind of occupation

which this warranty requires and which has been secured. The defendant has not stipulated for the continuous presence of some one in the premises, which he could have done by providing that the premises were never to be left unattended. I therefore give judgment for the plaintiff with costs.

* * * * *

Harris v. *Poland*

(1941) All ER 204

ATKINSON, J. - The plaintiff lives in a flat at 4, Chartfield Avenue, London. In Jan., 1939, she took out a Lloyds comprehensive policy insuring her against loss by fire, burglary and housebreaking and other causes at her flat. There was an attempted burglary at her flat during the summer, which made her nervous about the safety of her jewellery while she was out and the flat was empty. She had jewellery worth about £500. On Dec. 2, she was going out for the day. She had over £100 in banknotes, and, therefore, felt more uneasy than usual about the safety of her empty flat. It occurred to her that perhaps the least likely place which a burglar would suspect as a hiding-place would be in the fireplace in the sitting-room amongst the paper and sticks under the coalite. She was probably quite right. She got a piece of newspaper and wrapped the money and the jewellery in it. Particulars of the latter are given in the statement of claim. The notes were in a registered envelope, the pearl necklace was in a soft leather *suit* case, the wrist-watch was wrapped in tissue paper, the watch set in diamonds was in a grey leather case lined with velvet, the links were in tissue paper, and were in a cotton bag along with the wrist-watch, while the rings were in tissue paper. She wrapped the articles in a newspaper and hid the parcel in the fireplace under the coalite, mixed up with the paper already there. It may be observed that this care was very much in the interests of the under-writers on whom would fall any loss suffered from burglary.

The plaintiff returned home late in the afternoon, and, feeling cold, lighted the fire, forgetting all about what she had done. Early the following morning, she remembered the hiding of her jewellery and money. Two of the pieces were repairable, but the rest of them and the notes had been completely destroyed by fire. The plaintiff seeks to recover the loss – agreed at £460 – from the underwriters. The relevant words in the policy are to insure her "from loss or damage caused by fire… burglary, housebreaking, theft or larceny" and various other causes. The plaintiff says that the loss she has suffered comes within that plain and simple language. Goods insured against loss by fire have been unintentionally either totally destroyed or badly damaged by fire, and, therefore, she says, her claim comes exactly within the language used.

The view presented on her behalf is that, while the burning of something intended to be consumed by fire is, of course, not fire under the policy, the moment one gets the accidental burning of something not intended to be consumed by fire, there is damage by fire within the meaning of the policy, and, therefore, if insured property not intended to be consumed by fire is ignited and thereby damaged or lost, or if insured property is damaged by heat, smoke, water or demolition caused by the burning of property not intended to be consumed by fire, there is loss or damage by fire within the meaning of the policy.

The underwriters very properly want it to be made quite clear that they are not disputing liability on the ground of negligence, or on the ground that the loss was due to an act of forgetfulness on the part of the plaintiff, or on the ground that the loss was the inevitable result of her own act. In their view, the position is just the same as if a maid instructed by the plaintiff not to light the fire had forgotten or misunderstood her instructions and lighted it and so caused the loss. They agree that there has been accidental loss which would be covered by

an all risks policy, but they dispute that this loss is a loss by fire within the meaning of the policy. Their case and the principle they seek through the defendant to establish is that, where damage is done to insured property by a fire in a place where fire is intended to be – where fire has not broken bounds – the loss is not covered, because such a fire is not a fire within the meaning of the policy. It is said that there must be ignition where no ignition ought to be in order to create liability. The argument is that there must be a fortuitous fire somewhere where fire ought not to be, that it is only damage caused by such an accidental fire which comes within the policy, and that the actual burning of the insured property does not in itself constitute fire within the meaning of the policy. The idea presented is that there must be an unintentional coming of fire from its proper place to the insured property and that the policy is not concerned with the coming of insured property to a fire which is behaving itself with perfect propriety in a place where it is intended to be.

Counsel for the defendant urges that the first question which I ought to ask myself is whether there was a fire within the meaning of the policy, and that only if I find that there was does there arise the question whether or not such fire caused damage to insured property, and he contends that it is impossible to hold that the fire, intentionally lighted, and burning quite properly in the grate, was a fire within the meaning of the policy. According to this view, the short and simple words in the policy against "loss or damage caused by fire" mean loss or damage caused to insured property by a fortuitous fire of something not intended to be consumed by fire in a place where fire is not intended to be.

The whole difference between the parties lies in those last few words. Unless there is spontaneous combustion, and apart from fires caused by electricity or lighting, the unintentional burning of insured property must, I suppose, always be caused directly or indirectly by, or must be due to, fire created intentionally of matter intended to be consumed, as, for example, domestic fires, lighted candles, oil lamps, gas jets, matches, tapers, cigarettes. Of course, one does not insure against the happening of such intended fires. One insures against the risk of insured property getting burned by unintentional contact with some such fire, or with fire started by some such fire. A householder has of necessity to make use of fire in his house for heating and lighting. He knows that fire is a source of danger, not merely from the escape of fire from its legitimate place but also from things coming in contact with it in its legitimate place in any of the forms I have just enumerated. I have no doubt that, when the ordinary man insures against loss by fire, he believes that he is insuring against every kind of loss which he may suffer from the more or less compulsory use of fire by himself or his neighbour. If he were told that the words in a Lloyds policy meant only loss from contact with fire where no fire ought to be, many questions would spring his mind, as they spring to mine. Am I not covered, he would ask, if the wind blows something – say a valuable manuscript or a sheet of foreign stamps – into the fire in the grate, or if a careless servant drops something into the fire, or if my wife stumbles and causes her lace scarf or silver fox tie to get caught by a flame in the fire grate? To all these questions the answers of counsel for the defendant is: "No." But what if part of the scarf is consumed in the grate and the rest of it is consumed outside the grate on the hearth-rug? Do I get compensation for the part burnt outside the grate, though not for the part burnt in the grate? Also, what if the burning scarf burns a hole in the carpet? That is not the fault of the fire in the grate, which has

not broken bounds. Am I covered for that? Again, what is the position if the lace catches fire by coming in contact with a lighted candle on the dinner-table? The flame of the candle is in the exact place where it is intended to be. Is it on a par with the fire in the grate? Moreover, what if the wind blows a curtain against a lighted gas jet and the curtain catches fire? I imagine that the ordinary man would say: "Your policy is no use to me. I shall never know where I am. I want an underwriter who knows what he means and says what he means." There certainly ought to be some clear understanding as to the meaning of these apparently simple words, so that persons insuring may know where they stand, and – if the defendant is right – not continue in a fool's paradise believing that they have a protection which in fact they have not.

There are one or two well-settled rules of construction with regard to policies. One is that the construction depends, not upon the presumed intention of the parties, but upon the meaning of the words used. In ***Nelson Line (Liverpool), Ltd.* v. *Nelson & Sons, Ltd.*** [(1908) AC 16], LORD LOREBURN, L.C., said, at p. 20:

> I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole document.

There is another rule which I find summarised in ***Hamlyn & Co.* v. *Wood & Co.*** [(1891) 2 Q.B. 488], where LORD ESHER, M.R., said, at p. 491:

> I have for a long time understood that rule to be that the court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned.

Another rule of construction is that, as a policy is prepared by the underwriters, any ambiguity therein must be taken most strongly against the underwriters by whom it has been prepared. If a policy is reasonably susceptible of two constructions, that one which is more favourable to the insured will be adopted. Again, **in *West India Telegraph Co.* v. *Home & Colonial Insurance Co.***[(1880) 6 Q.B.D. 51], BRETT, L.J., said, at p. 58:

> An English policy is to be construed according to the same rules of construction; which are applied by English courts to the construction of every other mercantile instrument. Each term in the policy, and each phrase in the policy, is *prima facie* to be construed according to its ordinary meaning.

Guided by these principles, I can see no reason whatever for limiting the indemnity given by the policy in the way claimed by the defendant. In my judgment, the risks against which the plaintiff is insured include the risk of insured property coming unintentionally in contact with fire and being thereby destroyed or damaged, and it matters not whether that fire comes to the insured property or the insured property comes to the fire. The words of the policy are just as descriptive of one as they are of the other, and I cannot read into the contract a limitation which is not there. To enable me to accept the contention of the underwriters, I should have to read something into the contract, some such words as "unless the insured

property is burned by coming in contract with fire in a place where fire is intended to be." Why should I? What justification can there be for so doing? To what absurdities would it lead? A red hot cinder jumps from the fire and sets on fire some paper of value. Admittedly, there is liability. A draught from the window blows the same paper into the same fire. Is that any less an accidental loss by fire? Are the words in the policy any less applicable to the latter than they are to the former? A draught blows the flame of a candle against a curtain. Admittedly, there is liability. What if the curtain is blown against the flame of the candle, however? Surely the result must be the same. If it is not the same, the result is an absurdity. If it is the same, why should the result be different if one substitutes a fire in a grate for the lighted candle in a candlestick? Unless I am bound by authority to the contrary, or unless I can find a consensus of opinion to the contrary among textbook writers indicating a generally accepted interpretation of these words, I must give effect to the view I have formed.

Counsel for the defendant relies and it is his only prop upon ***Austin* v. *Drewe*** [(1816) 4 Camp. 360], not, indeed, upon the actual decision, which gives him no help, but upon two sentences to be found in the summing up to the jury by GIBBS, C.J. The facts of that case were very simple [p. 360]:

> This was an action on a policy of insurance against fire. The premises insured were used as a manufactory for sugar baking. The building was divided into seven or eight storey's. On the ground floor were pans for boiling the sugar, and a stove to heat them. From the stove a chimney or flue went to the top of the building, and as it passed each floor, there was a register in it with an aperture into the rooms, whereby more or less heat might be introduced at pleasure. The upper floors were used for drying the baked sugars. One morning the fire being lighted as usual below, the servant whose duty it was to have opened the register in the highest storey forgot to do so. The consequence was that the smoke, sparks, and heat, were completely intercepted in their progress through the flue, and were forced into the room where the sugars were drying. The smoke being perceived below, the alarm was given. One or two men were suffocated in attempting to open the register; but at last it was opened, and the mischief remedied. Had it remained shut much longer, the premises would probably have been burnt down: but in point of fact there never was more fire than was necessary to carry on the manufacture, and the flame never got beyond the flue. The sugars, however, were very much damaged by the smoke, and still more by the heat. The loss amounted to several thousand pounds. The question was whether this was a loss for which the insurance office was liable.

The head note is as follows:

> From the negligence of a servant of the assured in not opening a register, smoke and heat from a stove used in the manufactory are forced into a room and greatly damage goods, without actually burning any, the fire not being greater than it ought to have been had there been free vent for the smoke and heat. This held not to be a loss within the policy.

Judging from the head note, the grounds of the decision were the negligence of the plaintiff's servant and the absence of any burning of any of the insured property. Nowadays

it is well-established that negligence is immaterial, and, in the case with which I have to deal, there was burning of the insured property. In the direction to the jury, however, GIBBS, C.J., said, at p. 362:

> If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But can this be said, where the fire never was at all excessive, and was always confined within its proper limits? This is not a fire within the meaning of the policy.

There are several sources of damage from fire. There are the flames, the heat generated, and the smoke and sparks produced. Some might find it difficult to see how it could be said, when in fact smoke, sparks and excessive heat were forced into the room, that the fire was always confined within its proper limits. It could only be true of the actual flames. I asked counsel for the defendant what the position would be if the excessive heat had caused some of the bags to ignite, and the answer was that the loss would be within the policy – and yet it would have been just as true to say that the fire had not been brought out of the flue. I might put the question in a more awkward way. Suppose that some bags ignited and some were merely ruined by the heat. There would be liability for the former, but not for the latter, according to his view, yet the only distinction would be that in the one case there was ignition and in the other there was not.

The next report of this case to which I will refer is in Holt 126. There one can find little, if any, reference to this point about the fire escaping from its proper place. According to that report, I think that the ground upon which GIBBS, C.J., directed the jury was this [pp. 127, 128]:

> As no substance, therefore, was taken possession of by the fire, which was not intended to be fuel for it, as the sparks and smoke caused no mischief, but as the damage arose from an excess of heat in the rooms, occasioned by the register being shut, I am of opinion that the plaintiffs are not entitled to recover.

The main point, and the point in the forefront there, is surely that no substance was taken possession of by the fire which was not intended to be fuel for it.

The editor's note about that case is as follows, at p. 128:

> It is not to be concluded from this case that an insurer on a policy against fire is exempt from a loss occasioned thereby, on the ground that the servants of the assured have been careless or unskillful, and that the fire was occasioned by their negligence and misconduct. An insurer would unquestionably be answerable in such a case. The spirit of the decision of the present case is this: that there was no loss by fire, by whatever cause or misconduct produced. The injury arose from the misdirection of heat, occasioned by the unskillful management of the machinery in the sugar house. It was not, therefore, in any fair and reasonable construction of the policy, one of those accidents against which the defendant had engaged to indemnify the plaintiffs.

Therefore, the test of liability according to that report and according to that note is surely whether or not something has been consumed by fire which was not intended to be consumed.

There was a motion for a new trial in the Court of Common Pleas, and I turn to the report of that motion in 6 Taunt 436. It is interesting to read the arguments in that case and see how it was dealt with. The Solicitor-General, said this, among other things, at p. 438:

> If actual flame was the cause of the damage, it matters not whether the fire was properly or improperly lighted, but the question is whether fire occasioned the damage. If any other criterion be taken, it would in many cases of policies against fire introduce nice and intricate questions. It cannot be necessary that the fire, to produce a loss within the policy, should be only such fire as is communicated to some substance not contained in the intended and proper receptacle of fire.

Then he goes on to give other illustrations. He has put the very point for which counsel for the defendant contends. GIBBS, C.J., is reported to have said this, at pp. 438, 439:

> I think it is not necessary to determine any of those extreme questions. In the present case, I think no loss was sustained by any of the risks in the policy. The loss was occasioned by the extreme mismanagement by the plaintiffs of their register. I so directed the jury, and I have no reason to alter the opinion I then formed.

Then DALLAS, J., said, at p. 439:

> I am of the same opinion. The only cause of the damage appears to me to have been the unskillful management of the machinery by the plaintiffs' own servants, and it is therefore not a loss within the meaning of the policy.

The rule was refused, apparently on the ground of negligence. Be that as it may, it is very difficult to argue that this case is an authority for the construction put upon it by counsel for the defendant, when it is said by GIBBS, C.J., in terms, "I think it is not necessary to determine any of those extreme questions", one of them being this very question whether or not it is necessary that the fire should have taken place in some place other than the place where the fire was intended to be.

There was fourth report of this same case. It is in 2 Marsh. 130, GIBBS, C.J., is reported, at p. 132, in the same language as I have just read, and DALLAS, J., said:

> His Lordship's direction appears to me to have been perfectly right, and the jury have drawn a perfectly correct conclusion from it. There was nothing on fire which ought not to have been on fire; and the loss was occasioned by the carelessness of the plaintiffs' themselves.

Then PARK, J., concurred. The words "There was nothing on fire which ought not to have been on fire" suggests that the test of liability is that there must be the ignition of something which ought not to be ignited. In that case, there was no ignition of anything but the fuel, and, therefore, there was no liability, and no fire within the policy. The test is there laid down by DALLAS, J., and concurred in by PARK, J. That is exactly the case for which the plaintiff here contends - namely, that there was ignition here of something which ought not to

have been ignited, newspaper, sticks of wood, banknotes, cotton, leather, jewellery, and so on.

The next case to which I was referred was *Everett* v. *London Assurance* (1865) 19 CBNS 126. That was a claim on a policy of insurance against fire. There had been an explosion about a quarter of a mile away which had damaged the plaintiff's premises, so that the windows had been blown in and other damage sustained, and a claim was made that this was damage caused by fire within the meaning of the policy. The argument as to the effect of *Austin* v. *Drewe* is not without interest. It took the form of a quotation from **MARSHALL ON *INSURANCE,*** Vol. 2, Book IV (a), p. 790, which is as follows:

In **MARSHALL ON *INSURANCE,*** Vol. 2, Book IV (a), p. 790 (Edn. 1823), it is said that

> "by the terms of the usual policy, the insurers undertake to pay, make good, and satisfy to the insured all loss or damage which may happen by fire during the term specified in the policy... In order, therefore, to bring the loss within the risk insured against, it must appear to have been occasioned by actual ignition; and no damage occasioned by mere heat, however intense, will be within the policy.

In support of that proposition, ***Austin* v. *Drewe*** was relied upon. It ended up with a quotation with reference to ***Austin* v. *Drewe*** that the sugar was damaged "not by the smoke but by the excessive heat: but *nothing took fire.*" Those last words, "nothing took fire", are in italics, showing that those were the words intended to be taken as the test. In that case, BYLES, J., said, at p. 134:

> The expression in the policy which we have to construe is "loss or damage occasioned by fire."

That is exactly the expression which I have to construe in this case, except that I have the word "caused" instead of the wood "occasioned." Then BYLES, J., continues as follows, at p. 134:

> Those words are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case, there is a loss, in the other damage, occasioned by fire. LORD BACON says: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contented itself with the immediate cause, and judged the acts by that, without looking to any further degree."

It is a little too wide, because it is clear that there need not be ignition of part of the premises where the article is if the loss is, occasioned by the ignition of premises in the near neighbourhood, but the result is the same.

There is one other case to which I was referred, and that is ***Upjohn* v. *Hitchens*** [(1918) 2 K.B. 48]. During the argument in that case, SCRUTTON, L.J., said, at p. 61:

> It has been held, however, that "fire" within the meaning of a fire policy means fire which has broken bounds, so that damage caused by excess of fire heat in an ordinary grate is not damage by fire within the policy.

I do not think that I can attach very much weight to an intervention of that kind with no argument about it, but there is something which I think is a little more relevant in the judgment of PICKFORD, L.J., at p. 53. In that case, there was a covenant to insure premises against loss or damage by fire, and the question was whether such damage was within, a policy which did not cover the premises for damage caused by enemy aircraft. PICKFORD, L.J., said,

> Nor am I impressed by the other case put where it has been held that the ordinary policy against fire does not cover damage caused by overheating from a fire in an ordinary grate. There the damage was held not to be damage by fire, but damage by heating, damage caused by an ordinary domestic fire not being covered unless it sets fire to the house.

He must have used the word "house" because he was dealing with a case of fire in a house.

Substituting the words "insured property", again I find the same test laid down by HALLETT, J., in a similar case. The weight of authority seems to me to be strongly in favour of the test contended for by counsel for the plaintiff, and I think that the true test is whether or not there has been an ignition of the insured property which was not intended to be ignited. If there has been, the loss is one caused by fire. That is to say, has insured property been damaged otherwise than by burning as a direct consequence of the ignition of other property not intended to be ignited? In other words, I base my view in substance on what DALLAS, J., said in ***Austin* v. *Drewe***.

I was referred to textbooks, including one very old one, MARSHALL ON INSURANCE, a quotation from which I read in ***Everett's*** case. The next, I think, was BUNYON ON INSURANCE. There is no suggestion in Bunyon's book of this limitation about the fire being restricted to places where fire is not intended to be. There is a paragraph describing his view of the risk insured against, at p. 161:

> The "risk" must now be construed as applicable not only to loss by fire, but also to loss by the agency of the other perils insured against. In the case of loss by fire, there must, of course, be actual ignition, not necessarily of the property itself, but of some substance near to it.

He refers to ***Austin* v. *Drewe*** and continues as follows, at p. 162:

> It is not, of course, necessary that the property must be itself on fire, since losses by smoke and water, when the fire has not touched the objects insured, are familiar to all managers of insurance offices. All that appears to be necessary is, that something should have caught fire, and damage have been thereby occasioned to the insured property.

The next was **MACGILLIVRAY ON *INSURANCE,*** which was the one textbook in which counsel for the defendant could find any support for his contention, because the author says, at p. 809:

> Fire within the meaning of a fire policy means fire which has broken bounds. There must be actual ignition where no ignition ought to be. Damage caused by

> excess of fire-heat in its proper place, or by smoke from a fire in its proper place, is not damage by fire. Thus, where articles are destroyed in process of manufacture by the excessive application of heat, whether by negligence or pure misadventure, the damage cannot be recovered as damage by fire, unless they have actually ignited.

I do not know exactly what that means, but at any rate there is some suggestion there on the lines of the argument of counsel for the defendant. In my view, however, a careful examination of the one authority on which that rests really negatives his argument that that case is an authority for his proposition.

Then, as a matter of interest, I was referred to **WELFORD AND OTTER BARRY ON *FIRE INSURANCE*,** 2nd Edn., p. 61:

> Any loss, therefore, occasioned by such a fire, whether by the burning of any property in the fire itself, or by the scorching or cracking of any property adjacent to it owing to its intense heat, if unaccompanied by ignition, is not covered by the contract, since the cause of the loss cannot be regarded as a peril insured against.

That line in particular, "whether by the burning of any property in the fire itself", was strongly relied upon by counsel for the defendant. However, the answer was to refer to **WELFORD AND OTTER BARRY ON *FIRE INSURANCE*,** 3rd Erd., p. 59. Before one refers to what is said there. I want to refer to the preface to the third edition:

> Many questions in fire insurance are not covered by direct authority, and may still be regarded as open. In discussing such questions, an attempt has been made to answer them... Another example, which is discussed for the first time in this edition, is the question whether an article which accidentally falls into a domestic fire and is burned there is destroyed by fire within the meaning of a fire policy.

There is a statement by an author that whatever may have been said in the second edition was not the result of a discussion or consideration of this particular question, and then he says, at p. 59:

> So long as the fire is burning in the grate or furnace, it is fulfilling the purpose for which it was lighted. If, therefore, property adjacent to the fire is merely damaged by scorching or cracking, owing to its proximity to the fire, the loss is not covered; though the element of accident may be present, there is no ignition of the property, and nothing is on fire which ought not to be on fire. If, however, the fire breaks its bounds and, by throwing out sparks or otherwise, causes ignition to take place outside the grate or furnace, there is at once a loss by fire within the meaning of the contract. The question then arises, what is the position where property is accidentally burned in an ordinary fire, such as a domestic fire: the fire never breaks its bounds, but something which was never intended to be burned falls or is thrown by accident into the grate and is burned. In this case, equally with the case where the fire breaks its bounds, there is an accident and something is burned which ought not to have been burned. The only distinction between them is that in the one case it is the fire which escapes out of its proper place and comes into contract with the property destroyed, whereas in the other case it is the property which gets out of its proper place and comes in contact with the fire. This distinction does not appear to be

> sufficient to make any difference in the result. The object of the contract is to indemnify the assured against accidental loss by fire, and so long as the property is accidentally burnt, the precise nature of the accident seems to be immaterial. It may be therefore concluded that the loss in both cases falls equally within the contract.

In the textbooks, there is no clear consensus as to the meaning of these words which might force one to say that they have acquired an authorised meaning to which one can give effect. The most which counsel for the defendant can get out of the textbooks is perhaps a difference of opinion or an ambiguity. However, ambiguity is not his case, because the interpretation of those words which is most favourable to the insured must be adopted, and it seems to me that, if the underwriters wish to avoid liability, they must put words to that effect in their policy. In my judgment, the plaintiff is entitled to succeed. It is, of course, an unusual case. It has not been suggested that the loss was due to the negligence of the plaintiff. The underwriters have made it clear that they wish to stand or fall on the principle for which they have contended. I give judgment for the plaintiff for the agreed amount of £460.

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T H E E N D