

Privy Council Appeal No. 61 of 1917.

Nederlandshe Handel Maatschappij - - *Appellant,*

v.

Maneckjee Pallonjee - - - - *Respondent,*

FROM

THE CHIEF COURT OF LOWER BURMA.

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 21ST MARCH, 1918.**

Present at the Hearing :

VISCOUNT HALDANE.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR WALTER PHILLIMORE, BART.

[*Delivered by* SIR WALTER PHILLIMORE, BART.]

This is a case which has given their Lordships much trouble and anxiety.

The plaintiff, who is a customer of the defendant bank, sues the bank for refusing to honour his cheque for 45,000 rupees. The bank defends its refusal, saying that the customer had not sufficient funds to his credit; and the question turns upon a disputed payment of 15,000 rupees, averred by the plaintiff, but denied by the bank, to have been paid to his account on the 20th May, 1913. The trial Judge (Robinson J.) decided that the plaintiff had not proved payment and gave judgment for the defendant bank, except in respect of a small sum which was admitted to be standing to his credit.

On appeal the Chief Judge (Sir Charles Fox) and Parlett, J., reversed this decision and gave judgment for the plaintiff for the amount due to him according to his contention, with a small sum for damages. Nothing turns upon the form of the judgment.

There is thus a sharp dispute of fact. The two stories are irreconcilable, and as the Courts in India have differed, the final decision is one of grave difficulty. It will be best to proceed from the known and admitted facts and see what bearing they have upon those remaining in controversy.

The plaintiff is a merchant in a good way of business in

Rangoon; he had been a customer of the bank for some time; he had a son named Motabhoy, a young man aged about 25, at the time of these transactions, married, and in receipt of an allowance from his father. Shortly before, upon the occasion of a successful sale of a business called the Delta Navigation Company, his father had given him a bonus of 9,200 rupees. The son had also an account at the bank.

Some days before the 20th May the plaintiff had notice from the proper Government officer that 15,000 rupees, in respect of some land which the Government had purchased at Insein, would be payable to him on the 20th; and he sent Motabhoy to receive it for him. He went to Insein and received the money in a bundle of notes—100 of 100 rupees each, 500 of 10 rupees each, a large bundle, too big for his pocket—and he got back to Rangoon by train in time to enable him to go to his house and pick up his father's chalan book (paying-in book) and get to the bank before 3 P.M., when the bank closes. Motabhoy states, but this is denied, that he went to the bank, paid in 15,000 rupees, having filled in the foil and counterfoil of the chalan book and left it with the third cashier, to whom, according to his story, he had handed the notes, one Jagganath, till the next day. He also says that he took his own chalan book and paid in to his own account 300 rupees, filling in foil and counterfoil, and leaving that book also with Jagganath. That he did pay in 300 rupees to his own credit is admitted by the bank, but the bank says that this payment was not made on the 20th, but on the 21st. It is agreed that he also paid in to his own account 500 rupees on the 21st. He says early on the 21st; the bank says that this payment was made later on in the morning and at an appreciable interval of time after the payment of 300 rupees. There is a minor dispute as to the cashier who received 500 rupees. Motabhoy says that he got his father's chalan book duly stamped and initialled on the 21st. He also says that it was the same cashier, Jagganath; the bank says it was the second cashier, Chaggan Lal.

On the 26th May the plaintiff, accompanied by his son, went to the bank and presented his cheque for 45,000 rupees, money which he wanted to pay for some land which he had bought. He was told that there was not so much money to his credit; thereupon a dispute arose. Pandiya, the chief cashier, told the plaintiff to get his chalan book. The son went for it and returned with it, when the counterfoil appeared to be duly stamped and initialled. The manager, Van Rossum, was then called in, and the books of the bank were inspected. There was no trace in them of any such payment, and there was no foil as there ought to have been, in the bundle of foils for the 21st May. On the other hand, there was the chalan book, with the counterfoil apparently duly stamped, and the initial J., which ought to have been that of the accountant Jurjens, across it

In these circumstances the manager took time to enquire.

Next day, the 27th, the plaintiff and his son went again to the bank, accompanied by Mr. Rahman, an advocate, and the matter was again discussed. Each side contended that at the meetings of the 26th and 27th the other side so spoke and acted as to make admissions against itself. But all this is in controversy; and their Lordships get little help from this source. Two points only need be noticed. It is not in controversy that on the 26th Pandiya demanded the production of the chalan book, a course which he is not likely to have taken if he knew that the money had been paid in and that the stamp with the initial J. would appear on the counterfoil. This renders it unlikely that he was a party to the abstraction of 15,000 rupees, or knew that it had been abstracted by Jagganath. On the other hand, the line taken by the bank manager was not one of absolute denial. He treated the matter as one still for enquiry. One reason for this was the absence of Jagganath. He and Pandiya were brothers. Somewhere about the middle of May Pandiya had received a telegram saying that his sister, living at Ahmedabad, in India, was seriously ill. As she was a widow and there were no male relations living near her, either he or his brother would have to go and perform the funeral ceremonies if she died; and he accordingly obtained conditional permission to send his brother. On the 23rd he heard of her death, and on the 24th he sent away Jagganath with a month's leave. This being so, a telegram of enquiry was sent to Jagganath, and his answer was obtained. The two telegrams are as follows:—

“Maneckjee Pallonjee's son Motabhoy says he has paid you on 20th May rupees three hundred his account and rupees fifteen thousand his father's account; three hundred are credited in our book, but fifteen thousand are not credited in our book. Can't find any voucher. Say whether you have received fifteen thousand or not.”

“Motabhoy has paid only three hundred rupees on his account. I don't know for his fifteen thousand at all, please.—JAGGANATH.”

Thereupon the bank finally declined to honour the cheque for 45,000 rupees.

A point was made for the plaintiff that the telegram from the bank stated, among other things, that the son's 300 rupees were paid on the 20th, and that Jagganath passed this, though he now says that they were paid on the 21st; but no importance should be attached to this; the manager when he dispatched the telegram knew that according to the bank's books the sum was paid on the 21st, but he did not call Jagganath's attention to this or ask on which day it was paid in, nor would it be reasonable to expect that Jagganath away from his books would remember the exact date of the payment in of a comparatively small item, the connection of which with the disputed payment of 15,000 rupees would not be apparent to his mind.

It is now desirable to state the practice of the bank with regard to receipt of payments. In the bank hall the counters

are arranged in the form of a horseshoe: in the centre at the upper end sits the ledger clerk, a Chinese; at his left, to the right as you come in, sits the accountant; next below the ledger clerk, to his right, sits the chief cashier; then the fourth, who acts as his assistant; then the second and third, whose duty it is to receive cheques and notes. Further down and nearer the entrance are the fifth cashier and durwans, who receive cash. All these are on the left-hand side as you come in. The clerks at the right-hand counter are engaged in other matters. Pandiya, the chief cashier, gives security to the bank for all the cashiers. The fourth cashier is his nephew. Jagganath, the third, is, as has been said, his brother. Chaggan Lal, the second, comes from the same part of the country. All have been long in the service of the bank. The counter is railed off by a carved wood railing, through which it is said that a customer could not put his hand, but through or under which parcels of the size of this bundle of notes could be passed. The rubber stamps which are impressed on the counterfoils are lying loose on the counter inside the rail; there were two at least between the second and third cashiers. There was no drawer under the counter into which to put them, or anything else. The chief cashier only had a drawer or desk.

When notes are paid in, whichever of the two cashiers receives them puts the stamp on foil and counterfoil; the other checks the counting and passes them to the fourth cashier. If they agree, either the second or third puts the word "entered" with his initials on the foil; the fourth then takes the notes and the chalan book to the chief, who counts the notes and puts them away, signs the foil and sends the chalan book to the Chinese ledger clerk. This ledger clerk enters the payment in the ledger to the credit of the customer, and puts a number on the foil. The chalan book then goes to the accountant and the accountant examines it. If all is in order, he tears off the foil, and enters the amount in his cash book. The foil is placed on a wire and stamped next day, with the date stamp of the preceding day, by the duffri and put away. Upon the counterfoil and across the stamp the accountant puts the initial J. At the end of the day the entries are all called over, and the money is put away in the safe. The customer receives his chalan book next day or any time when he calls for it. There is nothing in the bank books to show any trace of the 15,000 rupees or any irregularity.

Upon these facts two matters arise, which may be dealt with *in limine*: the first is as to the initial J, which certainly appears in its proper place across the bank's stamp on the counterfoil. The bank says that it is a forgery. An expert was called to prove this; but it is a hard matter to deal with one letter only, and neither Court in India attached much weight to his evidence. Jurjers says very properly that he cannot speak from the view of the mere initial, as to its being

his or not. But he says that it cannot be his because he never would have put it without making a corresponding entry in his book. The trial Judge believed it to be a forgery; the Judges in the Court of Appeal did not come to a decided opinion either way. The Chief Judge, however, has made a remarkable suggestion. He thought it possible, he even said probable—

“that after he signed counterfoils the foils remained on his desk until he was at leisure to write up his cash book; the chalan books may also have remained there for some time: if this was so, any particular foil and book may have been abstracted while he was away from his desk.”

No foundation was laid for this suggestion in the cross-examination of the witness; it is improbable that he would be so careless; and the theory involves the supposition, first that the chief cashier combined with the second and third to steal the money, and, secondly, that they ran the enormous risk of doing it in a way which was sure to be detected, unless they could rely upon the accountant's carelessness and their own sleight of hand.

Their Lordships agree with the trial Judge that the J has been forged. This, however, leaves it undetermined whether the forgery was the work of Motabhoy or of one of the cashiers; and there remains the serious point against the bank that there is the bank stamp upon the counterfoil.

The other preliminary matter is the disputed date of the payment in of 300 rupees. Great stress was laid upon this matter by counsel for the plaintiffs; but it seems almost as difficult to ascertain the truth upon this as upon the issue in the case. There is on one side the evidence of Motabhoy, corroborated to some extent by one Balthazar; on the other, the evidence of the cashiers. The plaintiff can rely upon the point that both foil and counterfoil of his son's chalan book have been stamped by the bank, and that the date on both is the 20th. On the other hand, the bank books have the entry as of the 21st, and the foil, which has been preserved, had been stamped, as it should be, in due course with the date-stamp of that day. It does not seem so extraordinary that the officials of the bank should have accepted without comment a paying-in entry which was one day in advance of the true date. Quite naturally and without any attempt to deceive, a customer might propose to make a payment in on a particular day and prepare his chalan book accordingly, and then be delayed and make the payment next day. It is true that the bank pays interest on current account, but it would pay according to the day in its books, and anyhow the interest on 300 rupees for one day is minute. Moreover, it is known that one bank official, and he the accountant, whose honesty has not been impeached, and who was subject to no cross-examination as to his accuracy, must have had the chalan book with the date of the 20th before him,

and yet have accepted without comment the 21st as the true date of payment.

Their Lordships cannot attach much weight to the corroboration by Balthazar. He was examined a year after the incident. He says he was reminded about it by Motabhoy. He may have gone with him on some occasions to the bank; but all turns upon the precise facts and the precise day. Moreover, if Motabhoy was meditating a fraud, he might have been clever enough to make evidence in support of it.

At their Lordships' bar it was suggested by the counsel for the plaintiff that what really happened might have been that both payments of 300 rupees and 15,000 rupees were made on the 20th, but late in the day that the chief cashier might out of indolence or carelessness put off reporting them till next day, and left the two bundles of notes in his desk; that they or one of them might have been stolen before the bank opened on the following morning and that the chief cashier rather than face his accountability for 15,000 rupees might have denied receipt of that sum. This implies either that the thief left the bundle of 300 rupees, or that the chief cashier then accepted responsibility for that sum and paid it out of his own moneys on the 21st, though he would know that the chalan book showed that it was paid in on the 20th, and that he anticipated that Motabhoy when he came for his father's chalan book would immediately notice the absence of the J and that therefore in order to stave off immediate enquiries he made evidence against himself whenever the inevitable enquiry ultimately came, by writing a forged J across the stamp on the father's counterfoil. These are serious difficulties in the way of the suggestion. Moreover, there is no trace of its having been made in any form in either of the Courts in India. Their Lordships cannot accept it.

It remains, therefore that the issue in the case has to be determined by the comparative weight to be attached to the evidence of Motabhoy, supported by the stamp on the counterfoil, on the one side, and of the cashiers, supported by the bank books, on the other. It is consistent with the plaintiff's theory that all three cashiers may have participated in the fraud, or that the chief cashier may have been innocent. In order to involve the chief cashier, it must be presumed that without any previous knowledge on the part of any of the three that this large sum was going to be paid in, the second or second and third determined to steal, reckoned on the willingness of the chief cashier to become an accomplice, and in some way arranged a plot with him on the spur of the moment, and either kept the bundle of notes or got him to keep it; for if once the matter passed on to the Chinese ledger clerk, whose honesty there is no reason to impeach, the plot became impracticable. It is not easy to conceive a plot which would have to be effected in such a manner. The chief cashier had been fifteen years in the bank—there is nothing against his

character. He was responsible to the bank for any deficiency in his own account, or in that of the other cashiers, so that if, when the inevitable enquiry was made, the bank came to the conclusion that, whatever was the real truth, the cashiers had acted so as to make it necessary for the bank to pay, as, for instance, by carelessly impressing the stamp or allowing the stamps to lie about so that one of them might be fraudulently impressed, he would have in the end to pay.

Comment has already been made upon the improbability of his making evidence against himself by forging the J, and it has been stated that when the dispute arose he challenged the plaintiff to produce his chalan book. Their Lordships cannot accept the theory that he participated in the theft.

As between Motabhoy and the second and third cashiers—for if the second stole, the third must have been an accomplice—it is difficult to decide. There is nothing against the character of any one of the three, and very little suggestion of motive. Motabhoy, on a not very large allowance from his father, kept horses. Jagganath, the second cashier, may have known that his sister was not merely sick but dying and did know that in that event he would be allowed to go home to Ahmedabad, in the Bombay Presidency; and it might have suddenly occurred to him that he could take the notes away and dispose of them there. There is the strong point of the bank stamp, as to which the only suggestion the bank can really make is that in some way, possibly by bribing one of the bank porters, or by some carelessness of a cashier when Motabhoy was bringing his own book, he (Motabhoy) got temporary possession of one of the stamps lying about. On the other hand, it is not easy to see how Jagganath could have safely handled, still less counted on safely handling, such a parcel of notes without the chief cashier noticing what was happening. Again, the one witness with whose demeanour the trial Judge was not satisfied was Motabhoy. Counsel for the plaintiff strove to displace the unfavourable observations of the trial Judge; and it is true that the period of his cross-examination when his method of answering became unsatisfactory was when he was being asked about collateral matters, such as the source from which he derived the two sums of 300 rupees and 500 rupees, his reasons for paying them in and for paying them in separately; but these matters, though collateral, were of some importance.

Towards the close of his judgment the trial Judge said: "My conclusion is as follows: The onus is on the plaintiff to prove affirmatively that the money was paid in and also to prove the fraud he alleges." As it has been rightly observed in the judgment of the Court of Appeal, the second question ought not to have been proposed. It would be enough for the plaintiff to prove that his son paid the money in. Though he might make suggestions to fortify his case, it was not for him to show how it came about that there was no entry in the bank books. But the trial Judge never reached the second question.

He decided upon the first. In so deciding he rightly stated the onus.

In *Wakelin v. The London and South-Western Railway Company* (L.R., 12, A.C. p. 41), the Earl of Halsbury well observed:—

“It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, *i.e.*, in this case the negligent act done, has discharged herself of that burden.”

This being so, their Lordships agree with the trial Judge that the plaintiff has not discharged the burden which the law imposed upon him. After careful examination of the reasons given in the judgment of the Court of Appeal and after listening to a full argument at the bar, their Lordships are of opinion that the judgment of the trial Judge ought not to have been disturbed.

There the matter must rest. The elaborate criticisms which have been applied to the record shows that several matters were insufficiently probed on either side in the course of the trial. In particular it may be noted that it is most probable that the Government official kept the numbers of the notes which he handed to Motabhoy, and if any of the larger ones had been presented during the year which elapsed before the trial it is possible that their source might have been traced. On the other hand, it is possible that the thief had not yet dared to pass them.

Upon the whole their Lordships will humbly advise His Majesty that the appeal should be allowed; that the decree of the Court of Appeal should be reversed, and the decree of the original Court restored; and that the defendant bank should have its costs in the original Court, and in the Court of Appeal, and of this appeal.

In the Privy Council.

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