

VANIK INCORPORATION LIMITED
v.
HETTIARACHCHI

SUPREME COURT
S. N. SILVA, C.J.,
BANDARANAYAKE, J. AND
YAPA, J.
SC (CHC) APPEAL NO. 38/98
HC NO. 221/97 (1)
MARCH 23, 2002

Bills of Exchange – Requirement of presentation for dishonour – Situations where presentation is unnecessary for dishonour.

The plaintiff-appellant company (the appellant) advanced monies on three different dates (a bill discount facility) for the purpose of hardware business which was owned by the defendant-respondent (the respondent). For securing the advance, the respondent tendered to the appellant three Bills of Exchange. When the Bills of Exchange fell due for payment they were dishonoured; and the respondent issued three cheques which were also dishonoured.

In an action for the recovery of money, the High Court took the view that the Bills could not be considered as “dishonoured bills” in view of the issue of the cheques. The High Court also held that the appellant had instituted another “action” to recover the monies on the three cheques. At the argument it was also contended that there was no presentation for the payment of Bills of Exchange by the appellant; hence, the respondent was not liable to make payment thereon.

Held:

- (1) The so called “action” instituted by the appellant was only a charge upon an indictment in criminal proceedings against the respondent for an alleged fraud over the dishonoured cheques. Hence, it was not correct to refer to such proceedings as “another action” by the appellant to recover monies due on the cheques. Hence, the dismissal of the action by the High Court on that ground was in error.
- (2) When the cheques issued by the respondent were dishonored, the respondent’s debt revived, reverting him back to the position of a debtor and the respondent was liable on the Bills issued by him. It was not

necessary to present the three Bills for payment in view of sections 52 (1) and 19 (4) of the Bills of Exchange Ordinance (the Ordinance), the acceptance to pay the three Bills being a general acceptance.

- (3) In view of section 46 (2) of the Ordinance presentment may be excused by waiver of presentment express or implied. In terms of the written arrangement between the appellant and the respondent, the respondent was liable to pay the Bills on maturity notwithstanding non-presentment of the Bills. The arrangement also provided that "notice of dishonor is waived".

APPEAL from the judgment of the High Court.

Prasanna Jayawardena with A. Siriwardena for appellant.

Padma Bandara with Palitha Mathew and Ms. Fareena Jaleel for respondent.

Cur. adv. vult.

June 14, 2002

SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of Colombo 1 dated 14. 08. 1998.

The plaintiff-appellant (hereinafter referred to as the appellant) is a duly incorporated company which carries on business as a Merchant Bank. In the course of its business as a Merchant Bank, the appellant grants bill discounting facility to its customers and advances monies to its customers on such facility. The defendant-respondent (hereinafter referred to as the respondent) carried on at the time material to this case the sole proprietorship business under the names of 'Nawala Hardware' and 'Janahitha Hardware'. At the request of the respondent, 10 a bill discounting facility was granted in terms of which, the appellant lent and advanced the following amounts to the respondent:

- (a) Rs. 928,000 issued on 30.08.1994 (B) Due date 28.11.1994
- (b) Rs. 971,541.65 issued on 21.10.1994 (C) Due date 28.11.1994
- (c) Rs. 1,899,541.65 issued on 30.11.1994 (D) Due date 30.12.1994

Thereafter, the respondent failed and neglected to repay the said sums and the appellant filed action to recover the said sums of money together with interest in terms of the said bill discounting facility referred to above. The learned Judge of the High Court dismissed the appellant's action with costs. The learned Judge of the High Court was of the view that, although the three (3) Bills of Exchange on which the said bill discounting facility was granted were dishonoured, they cannot be considered as "dishonoured bills", since the respondent had issued three (3) cheques marked P5, P7 and P12 in the payment of said sums due to the appellant. Learned High Court Judge was also of the view that, the applicant had instituted another "action" to recover the said monies due on the three (3) cheques. At the hearing, it was also contended that there was no presentment for payment of the Bills of Exchange by the appellant and therefore the respondent was not liable to make payment thereon.

Section 59 of the Bills of Exchange Ordinance, No. 25 of 1927 (as amended), refers to the discharging of a bill and reads as follows:

"Section 59 (1) – A bill is discharged by payment in due course by or on behalf of the drawer or acceptor.

"Payment in due course" means payment made at or after the maturity of the bill to the holder therefore in good faith and without notice that his title to the bill is defective."

Referring to what amounts to payments, Ryder and Bueno in *Byles on Bills of Exchange* (26th edition, Sweet and Maxwell, 1988, p 135), states that –

“A plea of payment of a bill should be supported by proof of payment in money, and not merely by proof of a satisfaction of it by an agreement. If payment otherwise than in money is alleged, it must be proved that the party to whom such payment was made elected to treat a payment in that form as equivalent to a payment in money. Thus, if bonds are accepted in payment, the payment is good though they prove to be valueless. *A cheque is normally conditional payment, the debt reviving on its dishonour [emphasis added]*”.

It is common ground that the respondent tendered three (3) Bills of Exchange (P4, P7 and P11) which were drawn by him to the appellant and the appellant granted the respondent a bill discounting facility. It is also common ground that when the three (3) Bills of Exchange fell due for payment the respondent issued three (3) cheques (P5, P8 and P12) in favour of the appellant, which were dishonoured. Payment by cheque, which amounts to a conditional payment, would be completed only after the realization of the cheque and money being credited to the drawee's account. When the appellant realized that the cheques given to him by the respondents were dishonoured, the respondent's debt revived, reverting him back to the position of a debtor. In such circumstances, the mere issuance of the three (3) cheques by the respondent did not amount to any payment in settlement of the three (3) Bills of Exchange. Therefore, the three (3) Bills of Exchange remain dishonoured since they were not discharged by the respondent by payment.

The learned Judge of the High Court had taken the view that the appellant had filed another 'action' to recover the monies due on the three (3) cheques. Even though, the appellant admitted that there were proceedings pending against the respondent over the dishonoured cheques these were criminal proceedings filed by the State. In other words, there was an indictment against the respondent for the alleged fraud. Hence, it is not correct to refer to such proceedings in the High Court as “another action” filed by the appellant to recover the monies

due on the three (3) cheques. Therefore, the dismissal of the appellant's application on that ground would be a serious error made by the learned Judge of the High Court.

It was submitted that there was no presentment of the bills for payment and therefore the respondent was not liable to pay the value of the bills. Admittedly, a Bill of Exchange must be presented for payment in order to render the drawer and indorser liable, as provided ⁸⁰ for in section 45 of the Bills of Exchange Ordinance. This section reads as follows:

“subject to the provisions of the Ordinance a bill must be duly presented for payment. If it be not so presented, the drawer and indorser shall be discharged.”

However, section 52 (1) of the Bills of Exchange Ordinance specifies situations where presentment for payment becomes unnecessary in order to render the acceptor liable. Accordingly, when a bill is “accepted generally” presentment for payment is not necessary. Section 19 of the Bills of Exchange Ordinance refers to two types of acceptance, ⁹⁰ namely general or qualified acceptance and subsection 2 of this section explains that, ‘a general acceptance assents without qualification to the order of the drawer whereas a qualified acceptance in express terms varies the effect of the bill as drawn’. A further clarification on the categorization of the kind of acceptance is given in section 19 (4) of the Ordinance, which reads as follows:

“An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere.”

The three Bills of Exchange in question specifically state that after ¹⁰⁰ sight they are to be paid to ‘Vanik Incorporation Ltd. or to its order’ thereby indicating that the acceptance of the bills was a general acceptance which did not need presentment for payment.

Moreover, section 46 (2) (e) of the Bills of Exchange Ordinance stipulates that presentment may be excused 'by waiver of presentment, express or implied'. The special conditions in the reference letter issued by the appellant to the respondent (P1) included the following:

"The applicant shall be liable to pay face value of the bill to Vanik on the date of maturity of the bill notwithstanding non-presentment of the bill for payment to the company . . . 110

Notice of dishonour is waived."

This, in my view amounts to express waiver of presentment.

On a consideration of the totality of the material before this Court, it is evident that there was no necessity for the appellant to take steps for the presentment of the three Bills of Exchange, for payment.

In the circumstances, the appeal is allowed and the judgment of the High Court of Colombo, dated 14. 08. 1998 is set aside. We enter judgment in favour of the appellant as prayed for with costs fixed at Rs. 5,000.

S. N. SILVA, CJ. – I agree.

YAPA, J. – I agree.

Appeal allowed.