

1968 Present : H. N. G. Fernando, C.J., and de Kretser, J.

K. C. C. PERERA, Appellant, and K. M. PERERA, Respondent

S. C. 617/66—D. C. Colombo, 21227/S

Cheques—Notice of dishonour—Burden of proof—Effect of words “Not arranged for” noted on the cheques.

In an action on two dishonoured cheques on which were noted the words “Not arranged for”, the defendant denied that there was notice of dishonour and put the plaintiff to strict proof of it. The plaintiff submitted that notice of dishonour was not necessary because the words “Not arranged for” indicated that when the cheques were presented there were no funds in the Bank to meet them.

Held, that, in the absence of any evidence by the plaintiff to show what exactly the words “Not arranged for” meant, the defendant was entitled, in view of the pleadings and the issues, to presume that nothing turned on those words. Moreover, there was no proof as to who wrote the words, for there was not even the seal of the Bank on the cheques.

APPEAL from a judgment of the District Court, Colombo.

N. S. A. Goonetilleke, for the defendant-appellant.

W. D. Gunasekera, with *W. S. Weerasooria*, for the plaintiff-respondent.

Cur. adv. vult.

June 25, 1968. DE KRETSEK, J.—

The Plaintiff sued the Defendant on five cheques marked A to E. This Appeal is concerned with cheques D and E in regard to which the judgment of the Trial Judge states as follows :

“There is no evidence to prove that notice of dishonour was given. Notice however is not necessary where the dishonour is due to absence of effects in the Bank’s book. The cheques D and E were returned with the remark “Not arranged for”. Notice of dishonour is therefore not necessary in respect of the cheques D and E.”

He gave judgment for the Plaintiff in the sum of Rs. 11,000 the value of cheques D and E—with legal interest and costs. The Defendant has appealed.

In his plaint, the Plaintiff has pleaded that there was notice of dishonour of these cheques and accordingly his cause of action was based on that plea. *He did not plead that there was no notice but that notice was not necessary in view of the absence of effects in the Bank.* The Defendant denied that there was notice of dishonour and put the Plaintiff to strict

proof of it. At the Trial, the Defendant raised the issues (No. 8) was notice of dishonour according to the provisions of the Bills of Exchange Ordinance given in respect of all or any of the cheques marked A, B, C, D, and E. (No. 9) if not can the Plaintiff have and maintain this action on all or any of the cheques marked A, B, C, D and E.

The Trial Judge answered Issue 8 in favour of the Defendant. Counsel for the Defendant submits that in consequence of that answer the Plaintiff's action should have been dismissed for in this case, on the pleadings and the issues raised, the one question was whether notice of dishonour, which is a condition precedent to the right of action on these cheques, had been given. Counsel for the Plaintiff submitted that there was evidence in the case which would justify the Judge's finding that it was one in which no notice of dishonour was necessary. He pointed to the words *not arranged for* noted on each cheque and claimed that this conclusively showed that when the cheques were presented, there were no funds in the Bank to meet them. He submitted that the Defendant could not claim to be taken by surprise in that he did not object to the admission of cheques with these words noted on them. The short answer of the Counsel for the Defendant is that the Plaintiff should have called evidence to show what exactly the words "not arranged for" mean and that unless that was done the Defendant was entitled in view of the pleadings and the issues to presume that nothing turned on these words. He also pointed out that there is no proof as to who wrote them for there is not even the seal of the Bank on these cheques.

Counsel for the Plaintiff asked for the opportunity on terms to prove what the words mean. I need hardly point out that that would not conclude the matter for the Plaintiff would also have to prove that there were no funds to meet the cheque when it was due for presentation, for it is not contested that it was in fact presented after the due date. There appears to be no good reason why the Plaintiff should be given a chance of establishing that the decision of the umpire, given on the grounds he did not seek to establish, is in fact correct. This appears to be a case which should be decided in accordance with the pleadings, the issues raised on the pleadings and the evidence led relevant to these issues.

For these reasons, the appeal is allowed, and the Plaintiff's action is dismissed with costs in both Courts.

H. N. G. FERNANDO, C.J.—I agree.

Appeal allowed.
