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Present : Bertram C.J. and Garvin A.J.

BOULTON v. VALLIPURAMPILLAI.

134—D. C. Trincomalee, 823.

Creditor requesting debtor to transmit money by post—Loss of money in transmission—Creditor's risk—Burden of proof that money was stolen in post.

Where a creditor asks a debtor to forward the money due, by post and the money is so transmitted, the risk of loss during transmission by post is on the creditor. The onus, however, of proving that the money was stolen in the post lies on the debtor.

THE facts are set out in the judgment.

H. J. C. Pereira, K.C. (with him *J. S. Jayawardene* and *Arulanandan*), for appellant.

A. St. V. Jayawardene, K.C. (with him *Peri Sunderam*), for respondent.

Cur. adv. vult.

December 15, 1921. GARVIN A.J.—

This was an application to certify certain payments, aggregating Rs. 3,000, made in part satisfaction of the judgment entered in case No. 823 of the District Court of Trincomalee. It was alleged that on July 22, 1921, a sum of Rs. 1,000 was paid to the plaintiff, and that on August 6 there was remitted to him by post a further sum of Rs. 2,000, made up as follows : A cheque for Rs. 1,000 and a currency note for Rs. 1,000. The plaintiff admitted receipt of the sum of Rs. 1,000 paid on July 22 and of the cheque for Rs. 1,000 remitted on August 6, but denied that the currency note for Rs. 1,000 was received by him.

Upon the evidence led in the case it would seem that, at the request of the defendant, Mr. Subramaniam, Crown Proctor of Trincomalee, obtained a cheque for Rs. 1,000 and a currency note for the like amount, and enclosed it with a letter in an envelope addressed to the plaintiff, George Boulton, Inspector of Police, Kurunegala. This letter he handed to his clerk, Ramapillai, who had seen him place the cheque and the currency note in the envelope, to be sealed. Mr. Subramaniam left the room for a few minutes to fetch some money to cover the cost of insurance and registration, and on his return he found the letter sealed. This was at about 9 or 9.30 A.M. The letter was left with the clerk to be posted, and was ultimately taken to the post by another clerk, Aiyaturai, who was aware of the contents of the envelope. The envelope was insured for Rs. 1,000, as it was apparently thought that the fact

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that the cheque was enclosed made no difference. The envelope was handed in at the Post Office a little after 11 A.M. on August 6.

On August 7 Mr. Boulton received advice that a registered letter had arrived for him. He went to the Post Office on August 8 and took delivery of the registered letter. The seals on the letter appeared to be intact. He walked across to his bungalow, a distance of about fifteen fathoms, tearing open the letter as he proceeded. He reached the house and called to his wife, who came to him as the envelope was being opened. They found the letter and the cheque, but not the currency note. Mr. Boulton promptly communicated with Mr. Subramaniam by telegram. In this state of the facts the defendant, in effect, invited the Court to hold that Mr. Boulton had received the currency note, and, having appropriated it, is now dishonestly resisting his claim to have payment to that extent certified.

The District Judge has accepted the evidence of Mr. Boulton and of his wife. I can see no reason whatever for interfering with that finding on this appeal.

It was urged, however, that, inasmuch as the currency note was remitted by post at the request of the plaintiff, the loss of the money during transmission by post must be borne by the plaintiff, and not by the defendant.

This contention can only succeed upon proof that the money was despatched by post under circumstances which show that the plaintiff requested the defendant to do so, and agreed to run the risk of loss in transmission.

Having regard to the large sum, which it was intended to transmit, the defendant might reasonably be expected to have produced better evidence in proof of the fact that the money was, in fact, in the envelope when it was handed to the postal authorities. It might, for instance, have been placed in the envelope in the presence of the Postmaster.

The evidence shows that for at least an hour or two the envelope was left with the clerks, the conduct of one of whom in connection with a case of forgery, in which he was a witness, was adversely commented on by the jury. It was this clerk who, in fact, took the letter to the post.

The evidence of Mr. Subramaniam shows that the note was placed by him in the envelope, and the evidence of Mr. Boulton establishes equally clearly that it was not in the envelope when it reached him. It was, therefore, extracted by somebody between those two points of time, and it is not possible on the evidence to say that it was so abstracted only after it had been handed to the Post Office.

The appellant has, therefore, failed to establish that the money was lost in the course of transmission by post.

Though, in view of this finding, it is not necessary to consider the matter further, I am not satisfied that, in the circumstances

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of this case, the plaintiff must be held to have requested the defendant to forward the money by post, and to have agreed to take the risk of loss in transmission.

This was a judgment-debt. The plaintiff was entitled to issue writ for the recovery of the amount of his judgment at once. He did not do so, and showed great forbearance. The defendant appears to have pleaded the plaintiff's absence at Kurunegala as a reason for not paying him promptly, whereupon the plaintiff appears to have indicated that it was possible for the defendant to remit the money by "insured post."

The fact that plaintiff expressly enjoined the defendant to cover the risk by insurance is to my mind a clear indication that he was not prepared to take the risk of the loss of the money in the post. On the contrary, while suggesting a method by which the defendant might, if he wished, remit the money, there is a distinct indication that the defendant should protect himself by insuring the postal parcel.

For these reasons the appeal is dismissed, with costs.

BERTEAM C.J.—

I have read the judgment of Garvin A.J., and agree with it, except on one incidental point.

The law with regard to the transmission of money by post will be found summarized in *Chitty on Contracts, 16th ed., p. 789*. The earliest case is that of *Warwicke v. Noakes*.¹ Lord Kenyon there laid down the law as follows: "Had no directions been given about the mode of remittance, still this being done, in the usual way of transacting business of this nature, I should have held the defendant duly discharged from the money he had received as agent. It was so determined in the Court of Chancery forty years since; and as the plaintiff in this case directed the defendant to remit the whole money in this way, it was remitted at the peril of the plaintiff." Subsequent cases indicate there must be either an express request or a request implied by the course of business between the parties, and impose the risk in such cases upon the creditor. In the present case the direction seems to me explicit enough. The incidental condition that the money sent should be insured does not seem to me to throw the risk on the debtor. It merely indicates a condition subject to which the sender is authorized to make use of the post, the object of the insurance being to cover the risk undertaken by the creditor. In the present case, however, it is not clearly proved that the money was stolen in the post. It may have been so stolen. It may equally well have been stolen before the letter was posted. The onus of proving that the money was stolen in the post lies on the debtor, and in this case he cannot be said to have discharged it beyond all reasonable doubt.

Appeal dismissed.

¹ (1791) *Peake N. P. 67*.