

1942

*Present : Moseley S.P.J. and de Kretser J.*NADARAJAH *v.* JONKLAAS *et al.*235—*D. C. Kandy, 686*

Cheque—Crossed and marked non-negotiable—Agreement not to present cheque for payment—Right of holder for value.

Where a crossed cheque which is marked "not negotiable" is given on the understanding that it would not be presented for payment,—

Held, that a holder for value is not entitled to sue upon it.

A PPEAL from a judgment of the District Judge of Kandy.

M. T. de S. Amerasekere, K.C. (with him *H. W. Jayewardene*), for the plaintiff, appellant.

H. V. Perera, K.C. (with him *F. C. W. Van Geysel*), for the defendants, respondents.

Cur. adv. vult.

August 27, 1942. MOSELEY J.—

The plaintiff brought this action alleging that he was the "legal holder" of a cheque drawn by the first defendant for the sum of Rs. 1,030 in favour of Messrs. M. Cader Saibo & Co. The cheque is dated 27th May, 1940, and appears to be drawn on an account in the name of "Herondale" Estate, of which second defendant is the owner. Cader Saibo & Co. appear from time to time to have supplied goods to the estate. They seem also to have acted in the capacity of forwarding agents for the estate. The firm's financial position was, apparently, at and about the time of giving of the cheque, unstable, and a practice had arisen whereby, to assist the firm, the first defendant would draw a cheque in their favour, receiving at the same time the firm's cheque for a like amount. The cheque, the subject-matter of this action, was given in such circumstances. These cheques, according to the evidence of the first defendant, were given by him on the distinct understanding that the cheques would not be negotiated or presented for payment. This is borne out by the evidence of one of the firm's clerks who, referring to this particular cheque, said that the firm undertook to return it to the first defendant without sending it to the bank. I emphasize this point because, while it is not clear in what manner precisely Cader Saibo & Co. were to benefit by such a fetter on their dealings with the estate cheque, there can be no doubt but that such an arrangement did, in fact, exist. What actually happened was this. Cader Saibo & Co. took the estate cheque to the plaintiff and obtained from him the face value. The plaintiff was asked not to present the cheque for one month, and this request was repeated, and granted, month by month, upon Cader Saibo & Co. paying Rs. 30 by way of interest. Finally, the cheque was presented at the bank for payment on September 28, 1940, and was dishonoured since the first defendant, despairing of having it returned to him according to custom, had stopped payment. The

plaintiff thereupon brought this action and the parties went to trial upon a number of issues, of which, in view of the conclusion at which I have arrived, it is only necessary to set out the following:—

- (2) Was the said cheque crossed “not negotiable” by the maker?
- (3) If so, is the plaintiff entitled to the rights and privileges of a holder in due course?

The learned District Judge answered these two issues, respectively in the affirmative and negative, and dismissed the plaintiff's action.

Counsel for the plaintiff-appellant argued the appeal in the first place upon the ground that the cheque was “admittedly” an accommodation bill, and he relied upon section 28 (2) of the Bills of Exchange Ordinance (Cap. 68), which renders an accommodation party liable to a holder for value. I have serious doubts as to whether or not the cheque in question can be properly described as an accommodation bill. If it were, the drawer of the cheque would *prima facie* be liable as a surety, that is to say, in the absence of any agreement such as that which has been proved to exist in this case. The term “accommodation bill” seems to me to connote liability on the part of the accommodation party. The fact that it was specifically agreed that the cheque should not be negotiated or presented for payment, seems to take the first defendant out of the category. Whether or not the cheque is an accommodation bill seems to me, however, to be immaterial in view of section 81 of Cap. 68, which deals with crossed cheques bearing the words “not negotiable”.

Counsel for the appellant contended that, since the latter section was, in his submission, in conflict with section 28 (2), the last named section, which deals particularly with accommodation parties, should prevail over a general section, as he characterized section 81. That argument would appear to be fallacious since Part II. of Cap. 68, which part contains section 28, deals generally with bills of exchange, which term of course includes a cheque, whereas Part III, within which section 81 falls, deals with cheques only. In the present case, the cheque is crossed and bears the words “not negotiable” and the evidence is that these words were imposed by the first defendant. The case, therefore, in my opinion, must be decided upon an interpretation of section 81, which is as follows:—

“81. Where a person takes a crossed cheque which bears on it the words ‘not negotiable’, he 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.”

Counsel for the appellant sought to restrict the meaning of the word “title” to the mere act of possession. This seems to me to be altogether too narrow a meaning. In fact, in the case of *The Great Western Railway Company v. The London and County Banking Company, Limited*¹ which was cited, although not quite on this point, by Counsel for the appellant, at page 418 Halsbury L.C., said:—

“The supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me to be absolutely illusory.”

¹ (1901) A.C. 414.

Apply those words to the present case and what follows? There was a distinct agreement, to which I have already referred more than once, that the cheque should not be negotiated or presented for payment. Clearly Messrs. Cader Saibo could not have sued on it. Equally clearly, in view of the terms of section 81, the plaintiff cannot sue upon it.

In my view the learned District Judge answered issues 2 and 3 correctly and the plaintiff's action was properly dismissed.

I would dismiss the appeal with costs.

DE KRETZER J.—I agree.

Appeal dismissed.

