

JUDGMENT.

WESTROPP, C.J.—The Court answers the question of the District Judge in the affirmative. It agrees with him in thinking that the khata has been sufficiently signed by the deceased, the debtor's name having been introduced in his own hand-writing at the top of the entry, the whole of such entry being in the same hand-writing: *Khawaja Muhammad Janula v. Venkatarayar and another* (1), *Andarji Kalyanji v. Dulabh Jeevan* (2).

1880
SEP. 28.
APPEL-
LATE
CIVIL.
5 B. 89.

5 B. 92.

[92] ORIGINAL CIVIL.

Before Sir Charles Sargent, Justice.

IN THE MATTER OF THE NURSEY SPINNING AND WEAVING COMPANY, LIMITED; NATIONAL BANK OF INDIA, CLAIMANT; H. R. CORMAC AND OTHERS, *Official Liquidators*. [28th August, 1880.]

Company—Winding up—Bill of exchange—Liability of Company on bill drawn by Directors—Misrepresentation—Indian Contract Act (IX of 1872), ss. 18 and 19.

On the 9th October 1878 the National Bank purchased from the N. Company a bill of exchange for 4,000 dollars, equivalent to Rs. 8,680, drawn by the N. Company upon the firm of N. K. & Co., of Hongkong. The bill was in the following form:—"Sixty days after sight of this first of exchange (second and third of same tenor and date not being paid) pay to the order of the National Bank of India the sum of dollars four thousand only; value received and place the same to account of Nursey Kessowji, Ghelabboy Pudumsey, Directors. Nursey Kessowji Secretary, Treasurer and Agent. The Nursey Spinning and Weaving Company, Limited." The bill was duly accepted and presented for payment, but was dishonoured. On the 6th January 1879 the Bank gave notice of dishonour and demanded payment from the Company as drawers of the bill. On the 18th January 1879 the N. Company was ordered to be wound up, and the Bank sent in a claim against the Company as drawers of the bill, and subsequently sent in an alternative claim for Rs. 8,680 being the "amount paid by the Bank to and received by the Company."

Held on the authority of *In re The New Fleming Spinning and Weaving Company Limited* (3) that having regard to the form of the bill, the N. Company could not be made liable as drawers, but held also that the Bank was entitled to recover the amount of the bill from the N. Company as money received to the use of the Bank, on the ground that the Directors of the N. Company, while acting within their authority, had sold to the Bank on behalf of the Company, as a bill upon which the Company was liable, one upon which the Company was not liable, and had, therefore, been guilty of misrepresentation within the meaning of ss. 18 and 19 of the Indian Contract Act (IX of 1872).

THIS was a claim in the winding up of the above Company, made by the National Bank of India, to recover payment of the sum of Rs. 8,680 with interest, as money lent and advanced by the Bank to the Company.

On the 9th October 1878 the National Bank of India purchased from the Nursey Spinning and Weaving Company a bill of exchange for four thousand dollars (equivalent to Rs. 8,680), [93] drawn by the Company upon the firm of Nursey Kessowji & Co., of Hongkong. The bill was in the following form:—

"Due, 6th January 1879, exchange for \$ 4,000.

Bombay, 9th October 1878.

Sixty days after sight of this first of exchange (second and third of the same tenor and date not being paid) pay to the order of National Bank

(1) 2 M. H. C. R. 79 (81).

(2) 5 B. 89, *supra*.

(3) 4 B. 275.

1880
AUG. 28.

ORIGINAL
CIVIL.

5 B. 92.

of India the sum of dollars four thousand only, value received, and place the same to the account of.

(Signed) NURSEY KESSOWJI,
(") GHELABHOY PUDUMSEY,

} Directors.

NURSEY KESSOWJI,

Secretary, Treasurer and Agent,

The Nursey Spinning and Weaving Company, Limited."

Accepted.

Hongkong, 4th November 1878.
Due, 6th January 1879.
NURSEY KESSOWJI & Co.

The bill was duly accepted and was presented for payment, but was dishonoured.

On the 6th January 1879 the National Bank gave notice to the Company that the bill had been dishonoured, and demanded payment of the amount of the bill from the Company as the drawers. On the 18th January 1879 the Company was ordered to be wound up, and the National Bank subsequently sent in their claim against the Company as drawers of the bill.

In consequence of a decision of the High Court in December 1879 in the case of the *New Fleming Spinning and Weaving Company* (1), where it was held that a Company was not liable as drawers of a bill drawn in a similar form, the National Bank, on the 3rd February 1880, withdrew their claim against the Company as drawers of the bill, and sent in their present claim against the Company for money lent by the Bank to the Company.

[94] It was admitted by the Liquidators of the Company that the Rs. 8,680 had been paid by the Bank to two Directors of the Company, viz: Nursey Kessowji and Ghelabhoy Pudumsey, who signed a receipt for it which they were authorized to do by the Articles of Association. The sum was also placed to the credit of the Company in the Company's books.

Farran, for the National Bank.—The question is, did the Bank buy this bill for Rs. 8,680, or did it lend the money to the Company to be repaid? It was clearly the intention of the parties that the Company should be liable if the bill was not paid by Messrs. Nursey Kessowji and Company, of Hongkong. It was not the intention of the Bank to buy the bill out and out. Both parties in their books treat the bill as a bill, of the Bank. The Bank got from the Company, together with the bill, documents relating to certain bales of yarn as further security for the money. If the bill had not been accepted, the Bank could have sold the yarn, and thus paid itself out of the property of the Company. This shows that the Company was to be liable: *Van Wart v. Woolley* (2). If one person delivers a bill to another without endorsement, the circumstances must be considered in order to ascertain if he is liable in case the bill is not paid.

(1) 4 B. 275.

(2) 3 B. & C. 439.

The circumstances here showed that the bill was taken for an advance to the Company: *In re London and Mediterranean Bank* (1). Counsel referred to the Contract Act (IX of 1872), s. 18, cl. 3.

Hon. F. L. Latham (Acting Advocate-General), and *Inverarity* for the Liquidators of the Company.—There is no evidence here that the money was a loan. There was no loan, but the purchase of a bill. There is no remedy against the seller of a bill either on the instrument itself or to recover the consideration: Byles on Bills (12th ed.) p. 169; *Milnes v. Duncan* (2). They cited Chalmers on Bills, p. 173; *Jones v. Ryde* (3); *Young v. Cole* (4).

1880
AUG. 28.

ORIGINAL
CIVIL.

5 B. 92.

JUDGMENT.

SARGENT, J.—The questions which I have to decide, arise upon the adjudication of the claim of the National Bank of India against the Nursey Spinning and Weaving Company in liquidation. [95] The circumstances on which the claim arises are stated by William Baker, Manager of the said Bank, and Thomas Matheson, Accountant of the same, in their joint and several affidavit, sworn on the 25th February 1880. They say that on the 9th October 1878 a sum of Rs. 8,680 was paid by the Bank to the Nursey Spinning and Weaving Company for a bill of exchange purchased by the Bank from the Company on the above date, which bill has been put in evidence as Exhibit A: that the said bill was duly presented for payment to the acceptors, Nursey Kessowji and Company, of Hongkong, but was dishonoured; that on the 6th day of January 1879 the Bank gave notice to the Company that the bill had been dishonoured, and demanded payment of the amount of the bill from the Company as the drawers of the Bill. The order for the winding up of the Company was made on the 18th January 1879, and it would appear that the first claim that was sent in to the Liquidators of the Company by the Bank in the course of 1879 proceeded exclusively on the basis of the Company being liable on the bill. In consequence, however, of a similar claim made by the Bank of Bombay against the New Fleming Spinning and Weaving Company, in liquidation, on a bill identical in form with Exhibit A having been adjudicated on by Mr. Justice Green unfavourably to that Bank (which decision was subsequently affirmed by the Court of Appeal (5), the National Bank, on 3rd February 1880, wrote to the Liquidators of the Nursey Spinning and Weaving Company to say, that in supersession of their former claim, already sent in, they claimed as against the Company the sum of Rs. 8,680, being the amount paid by the Bank to and received by the Company on the 9th October 1878, as appears by the receipt bearing that date and signed by two of the Directors, and by the Secretary, Treasurer and Agent of the said Company, together with interest on the said sum from the said 9th October 1878 until the date of the winding up. At the hearing of the claim for adjudication, however, I was asked to regard the claim as presented for proof in its double aspect, in order that the Bank might, if so advised, have an opportunity of appealing on either ground if my decision should be unfavourable to the claim.

[96] Now, so far as the claim seeks to make the Company liable on the bill, it is disposed of by the decision of Mr. Justice Green (confirmed on appeal), to which I have before referred, and cannot therefore, be allowed. I proceed, therefore, to consider whether the Bank is entitled to

(1) L.R. 3 Ch. Ap. 651.

(2) 6 B. & C. 671.

(3) 5 Taunt 488.

(4) 3 Bing. N. C. 724.

(5) 3 B. 439. On appeal 4 B. 275.

1880

AUG. 23.

ORIGINAL

CIVIL.

5 B. 92.

recover from the Company the sum of Rs. 8,680, which, as the Bank alleges, was paid to the Company on the 9th October 1878. Now, it is not in dispute that the Rs. 8,680 were actually paid to two Directors, Nursey Kessowji and Ghelabhoy Pudumsey, who signed a receipt for it, as authorized to do by cl. 104 of the Articles of Association; and, further, that the said sum was placed to the credit of the Company in the books of the Company. It is also to be remarked that Nursey Kessowji was the banker of the Company. The Rs. 8,680 must, therefore, for the purposes of the question I have to decide, be deemed to have been paid to the Company. As to the circumstances under which it was so paid, the affidavit of Mr. Baker, the Manager of the Bank, can leave no doubt that the money was not advanced as a loan, but was paid for the purchase from the Company of the bill (Ex. A), and the affidavit, filed in August of this year, of Premchund Roychund, who acted as broker for the Company in the transaction, shews that the bill was offered for sale to the Bank as the bill of the Company, upon which the Company was liable as drawers, and that it was purchased, as such, by the Bank, both parties being then admittedly under the impression that the Company was liable on the bill. That being so, I am unable to distinguish the case on principle from the cases of *Jones v. Ryde* (1) and *Gompertz v. Bartlett* (2). In *Jones v. Ryde* the defendant discounted with the plaintiff a navy bill purporting to be for £1,884-16s. 10d. without endorsing it. The bill turned out to have been forged by inserting the figure 1 before the figures £884, the amount originally mentioned in the bill. Both parties were ignorant of this having been done. Payment was refused at the Pay Office when the bill was presented. However, a new bill was issued to the plaintiff by the office, in lieu of the old bill, for the right sum paid. The plaintiff then sued the defendant for the difference between what he had received at the Pay Office and what he had paid to the defendant, and the Court held he was entitled to [97] recover it. Gibbs, C. J., says: "The defendant has in the present case put off this instrument as a navy bill of a certain description: it turns out not to be a navy bill of that amount, and, therefore, the money must be recovered back."

In the case of *Gompertz v. Bartlett* (2) the defendant had produced to the plaintiff, for the purpose of being discounted, an unstamped bill drawn at Sierra Leone and accepted at London, but which was, in fact, drawn at London. The defendant said he did not wish to put his name on it, but that plaintiff might enquire about it, and, if he was satisfied, defendant would pay a liberal discount. The plaintiff was satisfied and discounted the bill. The bill was dishonoured, and the acceptor becoming bankrupt, an attempt was made to prove, under the bankruptcy of the acceptor, for the amount of the bill, but the claim was disallowed, as the bill was not stamped. Under these circumstances the plaintiff brought his action against the defendant to recover what he had paid for the bill as money received for the use of the plaintiff, and it was held by the Court of Queen's Bench that he was entitled to recover it. Lord Campbell says: "This is the case of a thing which is not what it professed to be when sold, and upon this ground I think the money must be taken to have been paid upon a mistake of fact, the bill not answering the description of that sold." And after referring to *Jones v. Ryde* (1) and *Younge v. Cole* (3), as authorities in support of the action, he adds:

(1) 5 Taunt 488.

(3) 5 Bing. N. C. 724.

(2) 23 L.J.Q.B. 65; 2 El. & B. 849.

"In principle the case is the same as if the vendor had professed to sell a bar of gold which turned out to be mere dross, coloured and disguised." Wightman, J., says: "I am of the same opinion, on the ground that the thing sold does not answer the description of that which the vendor professed to sell."

Now here we have the Company, by their Directors, acting within their authority, and admittedly in perfect assurance, selling a bill to the Bank on behalf of the Company as a bill upon which the Company was liable, which, however, turns out to be one upon which the Company was not liable. I say, acting within their authority, for the transaction was in its very nature, and was understood by [98] the Bank to be, one for the purpose of raising money for the Company, as provided by cl. 102 of the Articles of Association; and, indeed, it was, I think, admitted to be one of the ordinary modes by which Spinning and Weaving Companies, in the course of their business, anticipate the sales of their yarn and piece-goods exported to the China markets. The only difference between the cases I have referred to and the present case is that, in the former, the bill sold was different from what, on the face of it, it purported to be, while in this case it is different from what it was expressly represented to be by the agents of the Company in the ordinary course of business which they were authorized to transact. In all three cases what was sold was different from what the vendor professed to sell; in other words, there was a misrepresentation within the meaning of s. 18 of the Indian Contract Act, which, coupled with s. 19, provides that a contract shall be voidable when there has been a misrepresentation, "causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement." It was said that the exception to s. 19, which excludes from the operation of the section the case where the party whose consent was obtained by misrepresentation had the means of discovering the truth with ordinary diligence, is applicable to the present case. But no ordinary diligence would have enabled the Bank to discover that the Company was not liable on this bill. The form of the bill would naturally lead the Bank, as it admittedly did lead other Banks, to suppose that it was the Company's bill as represented, and the discovery could only be made by persons learned in the law and after a careful examination of legal authorities. I am, therefore, of opinion that the Bank is entitled to recover the sum of Rs. 8,680 with interest from the 9th October 1878 up to the date of the order for the winding up of the Company.

Attorneys for the Liquidators of the Company.—Messrs. *Ardaseer and Hormusjee*.

Attorneys for the National Bank of India.—Messrs *Smith and Frere*.

1880.

AUG. 29.

ORIGINAL)

CIVIL.

5 B. 92.