

avoided and as the deed is not a sham transaction, I do not see how the mere finding that the plaintiff is not a transferee in good faith can help the defendant.

I would, therefore, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on the defendant.

HEATON, J. :—I agree.

Decree reversed.

R. R.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Davar.

R. D. SETHNA (APPELLANT AND PLAINTIFF) v. JWALAPRASAD GAYAPRASAD, A FIRM (RESPONDENTS AND DEFENDANTS).^{*}

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August 27.

Shah Jog Hundi—Payment to the Shah—Fraudulent Hundi—Duty of Shah to trace the drawer—Payment of Hundi not as Shah but as indorsee for collection of the Hundi—Custom of Marwari merchants—In case of fraud, notice, when to be given—Laches.

On the 10th June 1912 the defendants presented to the plaintiff for payment a hundi for Rs. 3,000 purporting to be drawn by one R in favour of M on the plaintiff payable at sight to a *Shah*. The plaintiff having had no advice regarding the said hundi refused to pay the said sum of Rs. 3,000. On the next day the plaintiff received a letter purporting to be written by R from Harpalpur, enclosing a railway receipt for 300 bags of linseed, stated to have been consigned by R from Ranipur Station, and asking the plaintiff to sell the goods and in the meantime to accept and pay on presentment two hundis, each for Rs. 3,000, drawn by R in favour of M on the plaintiff, payable at sight to a *Shah*. The same day the plaintiff handed over the said railway receipt to one K and received payment of Rs. 5,600. The plaintiff thereupon paid Rs. 3,000 together with one day's interest to the defendants in respect of the hundi which had been presented by the defendants to the plaintiff on the

^{*} Appeal No. 17 of 1914 : Suit No. 1219 of 1912.

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previous day as aforesaid and which was one of the hundis mentioned in the letter. The goods referred to in the railway receipt never arrived and K returned the said receipt to the plaintiff and was repaid the sum of Rs. 5,600. On inquiries being instituted it was found that no such person as R existed and that the hundi and the railway receipt were forged. The plaintiff sued to recover the money from the defendants relying on the custom prevailing among Marwari Merchants that the Shah who obtained payment of a Shah Jog hundi was, in the event of the hundi turning out to be a false, fraudulent, stolen, or forged hundi, bound to refund the amount of the hundi with interest unless he "traced it to its source," *i.e.*, produced the actual drawer or the person who committed the fraud.

Held, (1) that the defendants had been paid not as Shah but as indorsee for collection of a hundi purporting to be drawn against the security of a railway receipt.

(2) Assuming that there might be a liability imposed on the defendants by reason of the payment, to refund or to trace the hundi to its source, this would only be the case provided notice was given within reasonable time of the discovery of the forgery, that is, provided the plaintiff lost no time in making this communication and claiming the refund.

(3) That the hundi had been "traced to its source" within the meaning of the Marwari Association Rules before the defendants received information of the fraud.

THIS suit was filed by one Bansidhar Lachminarayan, who subsequently became an insolvent and was represented by the Official Assignee, against the firms of Jwalaprasad Gayaprasad and Munalal Gayaprasad to recover the sum of Rs. 3,000 with interest from the 10th June 1912.

The facts of the case were as follows:—On the 10th June 1912 the first defendants presented to the plaintiff for payment a hundi for Rs. 3,000 dated Jeth Sud 15th, 1969. The said hundi purported to have been drawn by one Ramlal Ramprasad on the plaintiff in favour of the 2nd defendants, and was payable at sight to a Shah. As the plaintiff had received no advice with regard to the said hundi he refused to pay it. On the next day however he received a letter purporting to come from

one Ramlal Ramprasad from Harpalpur in Alipore State. In the said letter was enclosed what purported to be a railway receipt for 300 bags of linseed which were stated to have been consigned by Ramlal from Ranipur Station on the G. I. P. Railway to the plaintiff's address in Bombay, and the plaintiff was requested to sell the goods and in the meantime to accept and pay two hundies for Rs. 3,000 each which Ramlal had drawn on the plaintiff in favour of the 2nd defendants. The plaintiff accordingly delivered the railway receipt in performance of a contract to one Killachand Devchand and was paid by the latter Rs. 5,600. Thereupon the plaintiff paid the 1st defendants the amount of the hundi which had been presented to him on the previous day, *viz.*, Rs. 3,000, together with one day's interest and the hundi was endorsed as paid. The plaintiff likewise paid monies in respect of a second hundi which was presented to him by one Gopaldas Vallabdas and which like the first mentioned hundi was a Shah Jog hundi dated Jeth Sud 15th, 1969, and purported to be drawn by Ramlal on the plaintiff in favour of the 2nd defendant firm. The plaintiff, however, did not make any claim in this suit with respect to this second hundi.

Killachand Devchand was unable to obtain delivery of the goods covered by the railway receipt above-mentioned from the Railway Company and accordingly on the 6th August 1912 returned the railway receipt to the plaintiff, who repaid the sum of Rs. 5,600. Meanwhile inquiries were instituted with regard to the railway receipt and it was discovered that no such person as Ramlal Ramprasad, by whom the hundis purported to be drawn, ever existed and it was suspected that the hundies and railway receipt had been fabricated by one Kamlaprasad Munalal, the Station Master of Harpalpur. Kamlaprasad himself disappeared.

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The plaintiff, in support of his claim, contended that according to a well established custom amongst Shroffs relating to Shah Jog hundis the Shah who obtains payment of a Shah Jog hundi is, in the event of the hundi turning out to be a false, fraudulent, stolen or forged hundi, bound to refund the amount of the hundi with interest unless he produces the actual drawer or the person who committed the fraud.

The 1st defendants in their written statement denied that the amount of the hundi in question was paid by the plaintiff to them as Shah or that there was such a custom amongst Marwari Shroffs with regard to Shah Jog hundis as was alleged by the plaintiff. They also declared that the fraud alleged by the plaintiff was of such a nature that the plaintiff would not have been deceived by the same if he had exercised due care and vigilance and had instituted proper enquiries, and they further submitted that the plaintiff had been guilty of laches in discovering and communicating to them the alleged fraud and that he was consequently not entitled to recover anything from them.

The plaintiff was unable to effect service of the summons on the 2nd defendants and they were, at the first hearing of the suit, struck out.

The plaintiff's claim was first tried before Mr. Justice Macleod who held that the plaintiff had proved so far as was possible for him to do so, that the hundi had been forged. He also referred to *Davlatram Shriram v. Bulakidas Khemchand*⁽¹⁾ and held that the custom which the plaintiff alleged was well established, but he dismissed the suit on the ground that the plaintiff was guilty of laches in not having immediately informed the 1st defendants as soon as he discovered the fraud, that he

(1) (1869) 6 Bom. H. C. R. 24 (O. C. J.).

intended to claim a refund. The learned Judge found that Parshottam Raghovji, the plaintiff's gumasta, must have ascertained by the 10th or 11th August 1912 that the hundi was a forgery, but that no demand was made of the 1st defendants until the 25th September, equivalent to a delay of just over a month.

The plaintiff appealed.

Setalvad with *Desai* for the plaintiff and appellant.

Kanga with *Vakil* for the defendants and respondents.

SCOTT, C. J. :—This is an appeal from a decree of Mr. Justice Macleod dismissing the suit.

The suit was filed by Bansidhar Lachminarayan now an insolvent and represented by the Official Assignee to recover from the defendants Rs. 3,000 with interest from the 10th June 1912 upon a plaint containing the following allegations :—

On the 10th of June 1912, the plaintiff received a letter addressed to his firm in Bombay purporting to be from one Ramlal Ramprasad of Harpalpur in Alipur State in the Bundelkhand Agency. The letter enclosed what purported to be a railway receipt for 300 bags of linseed, stated to have been consigned by Ramlal from Ranipur station, and the plaintiff was asked to sell the goods and meantime to accept and pay on presentment two hundies for Rs. 3,000 each, dated the 15th Jeth Sud 1969, drawn by Ramlal in favour of the second defendant firm of Munalal Gayaprasad. On the same day one of the hundies, being a Shah Jog hundi drawn on the plaintiff by Ramlal in favour of Munalal, was presented by the first defendant and on the same day the other hundi mentioned in the letter was presented by Gopal-das Vallabdas.

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The first defendant's firm being respectable Shroffs and fulfilling the qualifications of a Shah, the plaintiff paid them the amount of the hundi on their responsibility according to the well-established custom in regard to Shah Jog hundis. The plaintiff delivered the railway receipt to one Kilachand in fulfilment of a contract for sale of linseed and received from Kilachand Rs. 5,600. - As the goods mentioned in the railway receipt never arrived, the plaintiff in August took back the railway receipt and refunded the amount paid by Kilachand. He was informed by the Railway Company on the 22nd of August that the railway receipt appeared to be a fabrication. The plaintiff also began inquiries on his own account from which he had reason to believe that the second defendant firm belonged to Kamalprasad Munlal, the Station Master of Harpalpur, that no such person or firm as Ramlal Ramprasad by whom the hundis purported to be drawn ever existed and that the hundis and the railway receipt were fabricated by the said Kamalprasad Munlal or by some one at his instigation or in collusion with him for the purpose of defrauding the plaintiff. The plaintiff says that in accordance with the well-established custom among Shroffs and according to the rules of the Marwari Panch Shroff Association in respect of hundis the Shah who obtains payment of a Shah Jog hundi is, in the event of the hundi turning out to be a false, fraudulent, stolen or forged hundi, bound to refund the amount of the hundi with interest unless he produces the actual drawer or the person who committed the fraud.

It was proved at the hearing that the above statement of facts as appearing in the plaint was not correct in that the hundi was presented for payment to the plaintiff on the 10th June by the first defendant and payment was then refused and was only made on the 11th after the arrival that day of the railway receipt and

after the payment by Kilachand of Rs. 5,600 being ninety per cent. of the price of the linseed supposed to be represented by the railway receipt. It was also proved that the Marwari custom referred to in the plaint as declared in the rules of the Marwari Association is that "In case of a hundi coming in any fraudulent way, if the party receiving the amount of the hundi receives it as a Shah he is absolved from liability if he traces the hundi to its source. But if he does not do so he must repay the amount of the hundi with interest."

According to the statement in the plaint the fraudulent way here referred to covers, not only the case of a forged, but also of a stolen or lost genuine hundi. To the same effect is the plaintiff's deposition. The first issue raised was whether the hundi in question was paid on the responsibility of the first defendant as a Shah and in accordance with the custom alleged.

The plaintiff with reference to this issue deposed that he did not know the writer Ramlal or the firm of Munalal Gayaprasad and if he had not got the railway receipt he would not have paid the hundi. He only paid on the hundi and another hundi presented by another firm of Shroffs up to ninety per cent. of the value of the goods. He paid the defendant's hundi in full and the other in part. He received Rs. 5,600 for the railway receipt from Kilachand before he paid the defendants. The learned Judge, however, disposed of the first issue by saying "the Shah does not guarantee the solvency of the drawer, he guarantees the genuineness of the hundi. A drawee will not pay a hundi unless he has funds in his hands belonging to the drawer, or is willing to give him credit. And he will not pay on presentation of a Shah Jog hundi to a Shah unless he is satisfied as to the respectability of the Shah as he looks to him in case of anything afterwards going

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wrong with the hundis : see *Davlatram Shriram et. al. v. Bulakidas Khemchand*⁽¹⁾. Therefore the issue is somewhat meaningless." We are unable to accept this view which was also pressed upon us by the appellant's counsel. In the case decided by Sir Joseph Arnould it was common ground that if payment were made to a Shah, as such, on a hundi which afterwards turned out to be stolen or lost, the drawee, who has paid, is entitled to a refund from the Shah to whom it has been mistakenly paid (unless he otherwise discharges himself in the customary way). Sir Joseph Arnould says at p. 29: "It seems to me that this evidence strongly tends to show that the drawee of the *hundi*, in accepting and paying it looks very mainly to the *Shah* as responsible in case of anything afterwards going wrong with the *hundi*; and that he relies on the solvency and respectability of the *Shah* as one of the principal grounds in inducing him to make payment without further inquiry."

But in the case of a lost or stolen hundi the hundi is *ex hypothesi* genuine: therefore the liability of a Shah who is paid does not rest on a guarantee of genuineness. The liability of a holder, who endorses a Bill of Exchange and passes it on under English law, is only that of a surety for the drawer and the acceptor but his position does not involve any liability to the acceptor.

We find it difficult to say what is the idea underlying the Marwari custom. It is perhaps this: that of two innocent parties the one nearest in the line of successive holders to the person who committed the fraud must find out the guilty party at the risk of otherwise having to recoup the innocent payer. In the present case, however, it appears to us that the first defendant was paid, not as a Shah, but as the indorsee for collection of

(1) (1869) 6 Bom. H. C. R. 24 at p. 29 (O. C. J.),

a hundi purporting to be drawn against the security of a document representing 300 tons of linseed, for payment was in fact refused until the railway receipt came to hand and had been sold for cash and no more was paid to the holders of the hundis than the exact amount realised on the railway receipt. This is a state of affairs not dealt with or contemplated in *Davlatram Shriram et. al. v. Bulakidas Khemchand*⁽¹⁾. The rules of the Marwari Association which have been put in relate to cases where the party who receives the amount of the hundi receives it as a Shah. If the plaintiff simply paid on the security of the railway receipt he would have no equity to recover back the amount from the first defendant: see *Leather v. Simpson*⁽²⁾; and *Baxter v. Chapman*⁽³⁾.

Assuming, however, that there might be a liability imposed on the first defendant by reason of the payment to refund or to trace the hundi to its source, this would only be the case provided notice was given within a reasonable time of the discovery of the forgery, that is, provided the plaintiff lost no time in making this communication and claiming the refund: see *Davlatram Shriram et. al. v. Bulakidas Khemchand*⁽¹⁾. The duty of the plaintiff cannot be put lower than this, although the Hindu law merchant may not be so strict as to notice of dishonour as the English law, as to which see *Megraj Jagannath v. Gokaldas Mathuradas*⁽⁴⁾. It is, however, quite clear that the plaintiff knew long before the end of August that the hundis and the forged railway receipt were part of a fraudulent scheme of kite flying perpetrated by Kamlaprasad, the Station Master of Harpalpur, the owner of the second defendant's firm, yet no notice was given till the

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demand of refund on the 25th September to the first defendant who in his ignorance had continued to deal with and give credit in account to the second defendant firm up to the end of the Maru year. It was upon this ground that the lower Court dismissed the suit and we agree that it was a sufficient ground.

We are also of opinion that the hundi had been 'traced to its source,' within the meaning of the Marwari Association Rules before the first defendant received intimation of the fraud and that the second defendant's firm was in the circumstances "the person from whom the forged hundi was bought" within the contemplation of Sir Joseph Arnould's judgment. The learned Judge thinks not, because the second defendant only sent the hundi for collection to the first defendant, but as he gave credit in account for the proceeds he was in effect the buyer of the hundi : see *Mulchand Joharimal v. Suganchand Shivdas*.⁽¹⁾

If the first defendant was only the holder for collection of a hundi handed to him by the second defendant's firm who were the actual payee (and as it appears also the drawer) the second defendant's firm would be the proper defendants to proceed against : see *London and River Plate Bank v. Bank of Liverpool*.⁽²⁾

We affirm the decree and dismiss the appeal with costs throughout excluding, however, the costs of cross-objections other than that as to costs.

Attorneys for the appellant : *Messrs. Malvi, Hiralal, Mody & Co.*

Attorneys for the respondents : *Messrs. Ardeshir, Hormusji Dinshaw & Co.*

Appeal dismissed.

M. F. N.

⁽¹⁾ (1875) 1 Bom, 23.

⁽²⁾ [1896] 1 Q. B. 7 at p. 12.