A.B. Miller Vs. the National Bank of India

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Court : Kolkata

Decided On : Nov-23-1891

Reported in : (1892)ILR19Cal146

Judge : Trevelyan, J.

Appellant : A.B. Miller

Respondent : The National Bank of India

Judgement :

Trevrlyan, J.

1. This case depends upon how far the defendant Bank can make use of the provisions of Section 39 of the Insolvent Act.

2. Although the written statement raises a question of banker's lien, no question of lien arises or has been argued before me. The determination of this case in no way depends upon any peculiar law incident to banking.

3. The Official Assignee of the Insolvent branch of this Court as assignee of the insolvent estate of Leo Zander and Company is suing to recover the balance of that firm's current account with the defendant Bank at the time of the vesting order.

4. The Bank contends that it is entitled to set off the amount of 12 bills drawn in their favour by the insolvents, and not accepted by the persons on whom they were drawn. Of these 12 bills, 8 were dishonoured by non-acceptance before the date of the vesting order. The remaining four were dishonoured after that date. There is no conflict of fact in this case. These bills were all drawn against shipments of jute made to England, which were hypothecated to the Bank in terms of an agreement made between the Bank and Messrs. Leo Zander and Company on the 16th of June 1886.

5. The jute has been sold by the Bank.

6. The Bank has given the drawers of the bills credit for the proceeds of the jute, has set off against their current account the difference between the amount of the bills and the net proceeds of the jute, and has paid the remainder of the amount to the plaintiff. The plaintiff claims to be entitled to the whole of the balance of the current account as it existed at the date of the vesting order, and contends that the Bank should only rank with the other creditors in respect of what they have lost on the bills.

7. The plaintiff contends that these bills having been sold in the open market to the

Bank, are on a different footing to what they would have been if they had been discounted in the ordinary course of business by the Bank. There is no doubt that the practice followed by Messrs. Leo Zander and Company was that when they wanted to raise money on their bills, they got their brokers to go round to the Calcutta Banks and get the best exchange they could for them. Sometimes the bills were sold to the defendant Bank, and sometimes to other Banks.

8. Apart from the bills there was no loan. It was riot as the banker of Messrs. Leo Zander and Company that these transactions were entered into, and I think it clear that the Bank's remedies depended only on their position as holders of the bills, and was not affected by the accident that the firm had an account with them.

9. In reality, I think the fact that the bills were dealt with in the way I have described makes no difference in the result of this case.

10. The determination of the questions in this case depends upon the construction of Section 39 of the Insolvent. Act. That section is as follows:

When there has been mutual credit given to the insolvent and any other person or persons, one debt or demand may be set against the other.

11. The case as to the eight bills and that as to the four others stand on a different footing.

12. The eight bills had at the time of the vesting order been dishonoured by non-acceptance and had been protested.

13. Mr. Hill for the plaintiff admits that if at the time of the insolvency there was an existing debt, there could be no doubt that the case would come under Section 39. If there was a debt it would follow that there was a credit from, at any rate, the moment when the debt came into existence. But he contends that the absence of notice of dishonour has prevented a debt coming into existence. By Section 30 of the Negotiable Instruments Act the drawer of a bill of exchange is bound in case of dishonour by the drawee or acceptor thereof to compensate the holder, provided due notice of dishonour has been given to or received by the drawer as provided by the Act.

14. By Section 94 of the same Act notice of dishonour may be in any form, but it must inform the party to whom it is given, either in express terms or by reasonable intendment, that the instrument has been dishonoured, and in what way, and he will be held liable thereon. Three of the bills were dishonoured in Dundee on the 8th October, the remaining five were dishonoured in London on the 9th October.

15. On the 9th October the Bank wrote to the firm of Leo Zander and Company as follows:

Calcutta, 9th October 1889.

Messrs. Leo Zander & Co.

Dear Sirs,

We beg to inform you that we have this morning received telegraphic advice from our Head Office that all your bills have been refused acceptance.

Yours faithfully,

(Sd.) W.H. Beddy,

for Manager.

We presume our Head Office refer to the bills which arrived in London this week.

16. Mr. Hill says that this included some other bills. It may have done so, but taking the whole letter together, I think not only that it included these bills, but that Messrs. Leo Zander must have taken it to include these bills. Mr. Quillet does not deny it. There is no evidence before me that it could have referred to anything but the eight bills. The remaining four bills could not have arrived in England. On the 30th October, which would be on the arrival of the first mail from London after the dishonour of the bills, the Bank wrote as follows:

Calcutta, 30th October 1889.

Messrs. Leo Zander & Co., (in liquidation).

Dear Sirs,

We hand you herewith six letters addressed to you by our London Office, dated 11th instant, advising that your bills of exchange, referred to overleaf, were refused acceptance and have been protested in consequence. The relative protests are in our hands.

Yours faithfully,

(Sd.) J.A. Toomey,

Manager.

Memo.

1,250 17 10

Bill on P.W. Wallace ... ... ,, 1,274 11 1

,, 1,263 7 10

,, 940 14 8

,, 300 6 9

Commercial Bill of Scotland ... ... ,, 925 18 7

,, 1,232 2 10

,, 1,232 2 10

Credit Lyonnaise ... ... ,, 1,248 4 3

17. In the meantime Messrs. Leo Zander had become insolvent, and this letter ought to have been sent to the Official Assignee. It does not appear that it was sent to him. I think that under the circumstances this notice of dishonour was sufficient. No answer was sent to it, and I have no doubt whatever but that Messrs. Leo Zander, and Company knew what it meant and were not in the smallest degree misled by it.

18. I think there can be no question that, so far as these eight bills are concerned, there was an existing debt, and the Bank was entitled to set off their loss on these eight transactions against the current account.

19. The case as to the remaining four bills is a different one. I don't think that there is any doubt but that the law in India is on this question the same as was the law in England at the time that the Indian Insolvent Act was passed. I do not think that in this respect, that is, with regard to the liability of a drawer of a bill before that bill is presented for acceptance, the Negotiable Instruments Act has altered the law. Section 37 of that Act provides that the drawer of a bill of exchange is liable thereon as principal debtor, and that the other parties thereto are liable thereon as sureties for the drawer. This only, I think, refers to their respective liabilities, and is enacted for the purpose of only distinguishing those liabilities. It does not give any new right of action. It must be read with the earlier Section (section 30) which provides for the liability of a drawer; until dishonour he has no liability and there is no debt.

20. Having regard to the position of the drawer, can it be said that, before the bill is presented for acceptance, there is a credit within the meaning of the Insolvent Act? I think not. The leading case of Rose v. Hart 2 Smith's L.C. 7th ed. 296; 9th ed. 324 shows that the credit must in its nature terminate in a debt, or as Byles, J., puts it in Naoroji v. Chartered Bank of India L.R. 3 C.P. 451 'Mutual credits I conceive to mean simply reciprocal demands which must naturally terminate in a debt.' There is no demand or debt until dishonour. The dishonour is not the natural result of the drawing. The drawer only undertakes to pay the amount of the bill in case of dishonour either by non-acceptance or non-payment.

21. The cases show that at least there must be a credit which would naturally result in a debt. There is authority to show that there must be a credit which must result in a debt--be it the one or the other. I think it is clear that, as far as the last four bills are concerned, the Bank is not entitled to the benefit of Section 39 of the Insolvent Act. It is to be noticed that there is nothing in the Indian Act to permit everything provable being set off.

22. There remains another question. Mr. Stokoe appears for the Bank and contends that it is entitled to set off the whole amount of the eight bills against the amount of the current account, and then to realize their securities and set off the amount against the rest of the debt. I do not agree with this contention. In the first place, I do not think that such a course would be in accordance with the contract. The agreement, which must be taken as being made with regard to each bill, gives the Bank power in default of acceptance or payment to sell the particular goods and apply the balance to the amount of the particular bill; in the event of surplus it may be applied to other debts, and it is only in such event that it can be so applied. There

was an agreement to carry the proceeds of the securities to the floating account. If what Mr. Stokoe contends for were to be allowed, the result would be that more than what was contracted for would be applied to the other bills, instead of the surplus after applying the particular bill to the particular security. Much more, namely, the whole amount of the security, would be applied. This is, I think, going beyond the contract. In the second place, I do not think that the Bank could be in a better position after the insolvency than they would have been if no vesting order had been made.

23. If no vesting order had been made, the Bank would have been bound by the contract, and if they realized their securities would only apply the proceeds in terms of that contract. In the third place, all that the Bank can set off under Section 39 is their debt. If they choose to realize their security, the debt is not the amount of the original bill, but the residue after the amount of the security has been applied towards payment. The result of these findings is as follows:

24. The amount of the account current at the time of the vesting order was Rs. 32,403-1-0. Of this the Bank has paid the Official Assignee Rs. 12,554-11-2. This leaves a balance of Rs. 19,848-6-7, for which this suit has been brought. The amount of the eight bills which were dishonoured before the date of the vesting order is 8,420-2-5. The net amount realized by sale of the goods hypothecated against the eight bills was 7,477-0-6. Deducting this from 8,420-2-5 leaves 943-1-11, which at 1s. 5d. per rupee, which is taken as the rate of exchange, is equivalent to Rs. 13,314-14-9. Deducting this sum from Rs. 19,848-6-7 leaves Rs. 6,533-7-10, for which there must be a decree with interest at 6 per cent. on decree and costs on scale No. 2.