

(1926) 01 BOM CK 0009

In the Bombay High Court

Case No : O.C.J. Appeal No. 100 of 1925 and Suit No. 2 of 1923

Cox and Company

APPELLANT

Vs

H. Pestonji and Company

RESPONDENT

Date of Decision : 25-01-1926

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 82
Stamp Act, 1899 — Section 3(b)

Citation : (1926) 28 BOMLR 1264 : (1926) ILR (Bom) 656

Hon'ble Judges : Norman Macleod, J;Coyajee, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Norman Macleod, Kt., C.J.—The plaintiffs filed this suit against the defendants to recover the amount due on forty-eight bills of exchange. These bills were drawn in England against certain shipments of goods which arrived in due course in Bombay. Twenty-five bills were drawn by Messrs, Royle and Binns, twenty by Davies Black and Co. Ltd,; and three by Wilkinson and Warburton Ltd., and they were all negotiated in London through Messrs. Cox and Co. who sent the bills to Bombay to be collected by their branch office. According to the particulars B, D and F to the plaint the bills were all accepted by the defendants and were duly presented on their respective due dates to the defendants for payment, but were dishonoured, and by mutual consent the time for payment was extended to the times mentioned in the said particulars. In spite of the extensions of time so granted the defendants failed to make any payments on the bills, except the sum of ? 274-12-10 mentioned in the particulars to the plaint. Accordingly, the plaintiffs sued to recover the amount of Rs. 4,24,996-8-0 with further interest from December 16, 1922, till judgment and costs of the suit and interest on judgment at the rate of six per cent, per annum till payment.

2. Various contentions were raised by the defendants in their written statement, but at the trial issues were raised not only on the pleadings but also on certain

other questions not raised in the pleadings. Arguments were heard on the latter issues, which were decided in favour of the defendants with the result that the suit was dismissed with costs.

3. For the purposes of this appeal the only issues are :--

(1) Whether the bills drawn by the three firms already mentioned were duly stamped and admissible in evidence?

(2) Whether if any of the bills were admissible in evidence, they were not effectively cancelled ?

4. On the first question as to whether the bills of exchange were duly stamped and admissible in evidence, the Judge held that thirty-seven of the bills were inadmissible, because material alterations had been made on them, and, therefore, they became new instruments which required to be stamped u/s 3 (b) of the Indian Stamp Act.

5. With regard to the eleven bills on which there had been, in the opinion of the learned Judge, no material alteration, he held that they were admissible in evidence, but that, as the due dates had been altered, they were effectively cancelled, and there being no new bills available on which to base the suit, the plaintiffs' claim should fail with regard to those bills also.

6. If the defendants' argument is correct, that because the holders extended the time for payment in favour of the acceptor, the bills were cancelled, then it would make no difference whether the fact of the extension of time for payment was entered on the bills or not. We cannot agree that the eleven bills, on which there was no material alteration on the face of them, were cancelled, merely because the time for payment was extended. Section 82 of the Negotiable Instruments Act defines in what way the maker, acceptor or indorser of a negotiable instrument is discharged from liability thereon. And, it cannot be said that when on the due date the acceptor asks for further time, and the holder gives him further time, the liability of the acceptor is thereby discharged.

7. The case of *Reed v. Deere* (1887) 7 B. & C. 261 relied upon by the respondents, is not applicable to the present facts, It was held in that case that where a party declared upon two written agreements, by the second of which variations were made in the first, and there were also counts upon each separately, and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped, the second could " not be used in evidence to support the plaintiffs' case, but might be looked at in order to ascertain whether the first was altered by it, and that, therefore, the plaintiffs could not exclude the second agreement and proceed upon the counts setting out the first only. In the judgment reference was made to the decision in *French v. Patten* (1807) 1 Camp. 72 that if the parties to an agreement, after they have signed it, introduce an alteration which cannot be read in evidence for want of a stamp, the old agreement is at an end. The principle involved in all these cases

depends on (1) whether there are two or more agreements one of which is unstamped, or (2) whether there is an alteration of the original agreement.

8. Then the question remains whether the thirty-seven bills are inadmissible in evidence as not being duly stamped. The bills were drawn in the usual form payable so many days after sight, and after acceptance by the defendants, a calculation was made by the plaintiffs' clerk in order to ascertain on what date the bills fell due, and a note was made in a corner of each bill of that date. When further time was given to the defendants, that date was struck out and the date synchronizing with the further time given to the defendants was entered, and the same process was gone through when time was again extended.

9. The first question is whether by entering those dates on the bills there was a material alteration effected. It is conceded that, if on the face of the bill as drawn, there is any material alteration, under the provisions of Section 87 of the Negotiable Instruments Act, the bill is not avoided against the defendants" who authorised or assented to the alteration, but it is argued that even if the bill is not avoided under the Act, the alteration avoids the bill under the stamp laws by making it a new instrument which requires a fresh stamp.

10. The defendants relied upon the decision of Mr. Justice Kajiji in their favour in *International Banking Corporation v. Pestonji & Co.* (1924) 27 Bom. L.R. 31 The appellants do not dispute the correctness of the decision on the facts of that case, because the relative bills, after the time for payment had been extended, were re-presented to the defendants for acceptance and the defendants re-accepted them. But, apart from that, the learned Judge was of opinion that there had been a material alteration in the bills when the due dates as originally calculated by the plaintiffs clerk and entered in a corner of the bills had been altered so as to coincide with the dates to which payment had been extended. The learned Judge said (p. 33):-

It is no body's case here that it was intended from the very beginning that the time of payment should be seven months after sight. Therefore the alteration from ninety days to four months after the due date is not altered because it was a mistake but it is altered in consequence of a new arrangement arrived at between three parties, viz., the drawers, the bank and the acceptor. But it is urged that on the face of it there is no alteration, that is to say, that) the words " ninety days after sight are not struck out and there is no alteration on the face of it, and the blue date in red ink which is put on the top of the bill on the right hand side is made by the bank in Bombay simply for their own convenience, and it is a mere memorandum, and there fore that does not amount to an alteration on the face of it, I see no force in this argument, In my opinion it amounts to an alteration. It is every body's case that ninety days were extended to four months after the first due date. Whether the red ink memorandum on the top of the bill of the second due date was there or not it makes no difference. I believe the evidence of Mr. Bremmer that it was not there when the bills were presented for re-acceptance. Every body knew that the date of payment of these bills of

exchange was extended by four months from the first due date. It must be held, under those circumstances, that the original bill was extinguished and a new bill was substituted in its place which was re-accepted and the due date of it was four months after the first due date.

11. We cannot agree with that argument, which is really based on the assumption that as soon as the holder's clerk makes a calculation according to the calendar as to the date at which the bill is due for payment, and notes that calculation on the bill, that note becomes part of the bill. It is sufficient to say that that is not the case. If it were, it would follow that the clerk, by making a wrong calculation and noting a wrong date, would thereby create a new instrument, which would require to be stamped.

12. The appellants relied upon the case of *Fanahawe v. Peet* (1887) 26 L. J. Ex. 314. In that case the defendants pleaded a set-off by the bank as indorsees of a bill of exchange for £891-1-7 drawn by the plaintiff, payable four months after date, on Begbie, Wiseman and Co., and accepted by them and afterwards dishonoured. The bill was drawn on September 8, 1856, and, would, accordingly, fall due on January 11, 1857. As the 11th was a Sunday it was presented on the 10th. The acceptors had signed below the following endorsement:-

Accepted payable at Messrs, Overend, Gurney and Co, London No, 1,736. Due 11th December 1856.

13. Pollock C.B. said (p. 315):-

The words " Due 11th December 1856 " appear to be a mere memorandum by a clerk or some person who prepared the bill for the acceptor's signature. The acceptance of the bill, is general according to its tenour.

14. Bramwell B. said (p. 315):-

I entirely agree with the decision of my Brother Martin at the trial, whether the question be one of fact or law. The bill is drawn at four months, and that bill is accepted. The figures inserted amount simply to an untrue statement of when the bill, as drawn, is payable.

15. That case sufficiently shows that it does not follow, that because a writing appears on the paper on which the bill is drawn, therefore, it becomes a part of the bill and constitutes a material alteration if at variance with the terms of the bill. If the original entry made by the clerk was not part of the bill, but merely a memorandum, then any alteration in the memorandum could not possibly be treated as an alteration of the bill. The Judge seems to have attached some importance to the statement of the witness Kaikhuehru, the plaintiffs' Head Clerk, to the effect that the due date as noted in the corner of a bill was an essential part of the instrument, but the opinion of the witness on a question of law would be irrelevant. In our opinion, therefore, these dates entered by the plaintiffs' clerk in the corner of the bills did not become part of the bills which still remained as they were drawn payable at so many days after sight. The

extraordinary result which would follow if the defendants' argument that the bill, if not avoided under the stamp laws were cancelled, were to succeed, can easily be shown by a simple illustration, " A bill is drawn on A and accepted by him, due on a certain date. On the due date A goes to the holder and asks for further time; the holder says, " You may pay in a week." The bill is cancelled. A is released from his liability under his acceptance." If this were sound law the whole course of dealing between merchants and banks would have to be reconsidered.

16. In our opinion, therefore, the appeal succeeds and the case must go back to the lower Court for trial on the remaining issues, The plaintiff's will be entitled to the costs of the appeal and the costs in the lower Court, on these issues.