Supreme Court of India
The New Marine Coal Co. (Bengal) ... vs Union Of India on 5 April, 1963
Equivalent citations: 1964 AIR 152, 1964 SCR (2) 859
Author: P Gajendragadkar
Bench: Gajendragadkar, P.B.

PETITIONER:
THE NEW MARINE COAL CO. (BENGAL) PRIVATE LTD.

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT:
05/04/1963

BENCH:
GAJENDRAGADKAR, P.B.
BENCH:
GAJENDRAGADKAR, P.B.
WANCHOO, K.N.
GUPTA, K.C. DAS

CITATION:
1964 AIR 152 1964 SCR (2) 859
CITATOR INFO :
R 1964 SC1714 (10)
R 1966 SC 580 (9)
R 1980 SC1285 (18)
RF 1980 SC1330 (5)
F 1987 SC1603 (43)

ACT:
Goods delivered under illegal contract-Party receiving the same and enjoying the benefit-Bound to pay compensation-Estoppel by negligence-Should be pleaded-Elements of Estoppel by negligence-There must be a legal duty-Negligence must be the proximate course-Government of India Act, 1935, (25 & 26, Geo. 5, ch. 42) s. 175 (3)-Indian Contract Act 1872 (IX of 1872), s. 70-Indian Evidence Act, 1872 (1 of 1872), s. 115.

HEADNOTE:
The appellant filed a suit on the Original Side of the Calcutta High Court against the respondent for the recovery of a certain amount representing the price of coal supplied to the respondent. The appellant's case was that if the contract under which the coal was supplied was illegal by, reason of it being in contravention of s. 175 (3) of the

Government of India Act, 1935, the respondent was liable to pay compensation under s. 70 of the Indian Contract Act, since the Coal was not supplied gratuitously and the respondent had enjoyed the benefit thereof.

The respondent's case was that the contract was illegal and s. 70 of the Indian Contract Act was not attracted. It was further alleged that the respondent had issued and sent bills to cover the amount and intimation cards in accordance with the usual practice and ordinary course of dealings. The respondent, it was allowed paid the amount by a cheque to a person authorised by the appellant and on presentation of proper receipts. It was therefore alternatively pleaded that the appellant's claim having been satisfied, he had no cause of action.

It was established in the course of the trial that the appellant had not in fact authorised any person to issue the receipts but a certain person not connected with the appellant

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firm, without the consent or knowledge of the appellant got hold of the intimation cards and bills addressed to the appellant forged the documents and fraudulently received the cheque from the respondent and appropriated the amount for himself. The respondent had not pleaded in its written statement that it was due to the negligence of the appellant that the third person was able to get hold of the intimation card and perpetrate the fraud. Neither was it proved in the case that the appellant was in fact negligent.

The Trial Judge found that the respondent was bound to pay compensation under s. 70 of the Indian Contract Act and rejected the alleged payment of the bills and in the result decreed the amount prayed for by the appellant. The respondent thereupon appealed to a Division Bench. Both the judges agreed that the appeal should be allowed. Regarding the invalidity of the agreement and the inapplicability of s. 70 of the Contract Act both the Judges agreed in favour of the present respondent. But while one of the Judges was not prepared to consider the plea of negligence which was raised by the present respondent for the first time in the appeal the other judge held that there was negligence on the part of the present appellant. The present appeal was filed on a certificate granted by the High Court.

In this Court, apart from the questions of the invalidity of the contract under s. 175 (3) of the Government of India Act and the applicability of s: 70 of the Contract Act, it was argued on behalf of the appellant that a plea of negligence should have been raised by the respondent in its pleadings and that the appellate court was in error in allowing such a plea to be raised for the first time in appeal. It Was contended further that in support of the plea of negligence it must be shown that the party against whom the plea is raised owed a duty to the party who raises the plea and that the negligence must not be merely or indirectly connected

with the misleading effect but must be the proximate cause of the result.
Held that the contract is illegal and void.
If in pursuance of the void contract, the appellant has performed his part and the respondent has received the benefit of the performance of the contract by the appellant, s. 70 of the Contract Act would justify the claim made by the appellant against the respondent.
State of West Bengal v, B. K . Mondal, [1962] Supp 1, S. C. R. 876, referred to.
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Since a plea of negligence was not raised by the respondent in the trial court the appellant is entitled to contend that it had no opportunity to meet this plea and dealing with it in appeal has, therefore, been unfair to it.
Before invoking a plea of estoppel on the ground of negligence, some duty must be shown to exist between the parties and negligence must be proved in relation to such duty.
The Arnold v, The Cheque Bank, (1876) 1 C.P.D. 578, referred to.
The negligence alleged must be proved to be the proximate or the immediate cause of the loss.
Bexendale v. Bennett, (1878) 3 Q. B. D. 525, referred to.
The broad proposition "that whenever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss, must sustain it" laid down by Ashhurst, J., in Lickbarrow v. Mason, 2 T. R. 63, on which one of the,Judges of the Division Bench has based his decision cannot be sustained as valid in law.
Commonwealth Trust Ltd. v. Akotey, [1926] A. C. 72, Mercantile Bank of India Ltd. v. Central Bank of India Ltd. (1937) L. R. 65 I. A. 75, R. E. Jones Ltd. v. Waring & Gillow Ltd., [1926] A. C. 670 and Farquharson Bros. & Co. v. King & Co., [1902] A. C. 325, referred to.
The appellant cannot be charged with negligence. which, in turn, can be held to be the proximate cause of the loss caused to the respondent. The appellant is entitled to be compensated under s. 70 of the Contract Act.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 421 of 1961. Appeal from the judgment and decree dated December 24, 1959 of the Calcutta High Court in Appeal from Original Decree No. 181 of 1956.

M. C. Setalvad, S. C. Ghose, J. B. Dadachanji, O.C. Mathur and Ravinder Narain, for the appellant.

Bishan Narain and P. D, Xenon, for the respondent. 1963. April 5. The judgment of the Court was

delivered by GAJENDRAGADKAR J.--This appeal arises out of a suit filed by the appellant, the New Marine Coal (Bengal) Private Ltd. against the respondent, the Union of India, on the original side of the Calcutta High Court to recover Rs. 20,343/8/-. The appellant's case was that it had supplied coal to the Bengal Nagpur Railway Administration in the month of.June, 1949, and the amount claimed by it represented the price of the said coal and salestax thereon. The appellant also made an alternative case, because it was apprehended that the respondent may urge that the contract sued on was illegal and invalid since it did not comply with s.175 (3) of the Government of India Act, 1935. Under this alternative claim, the appellant alleged that the coal had been supplied by the appellant not intending so to do gratuitously, and the respondent had enjoyed the benefit thereof, and so, the respondent was bound to make compensation to the appellant in the form of the value of the said Coal under s. 70 of the Indian Contract Act. The appellant's case was that since the said amount had to be paid to it at its Esplanade office in Calcutta, the original side of the Calcutta High Court had jurisdiction to entertain the said suit. Since a part of the cause of action had accrued outside the limits of the original jurisdiction of the Calcutta High Court, the appellant obtained leave to see under cl. 12 of the Letters Patent.

In its written statement, the respondent admitted the delivery of the coal to the Bengal Nagpur Railway Administration and did not dispute the appellant's case that it had forwarded to the respondent bills in regard to the amount alleged to be payable to the appellant for the said supply. The respondent, however, pleaded that the contract on which the suit was based was illegal inasmuch as it had been entered into in contravention of the provisions of s. 175 (3) of' the Government of India Act, 1935; and it was urged that s. 70 of the Indian Contract Act had no application. Besides, the respondent alleged that following the usual practice and course of dealings between the parties, an intimation card was issued and sent to the appellant by the respondent requesting the appellant to obtain payment on presentation of a proper receipt and authority against its bills in question. Thereafter, the respondent, on receipt of the said intimation card and a proper receipt executed on behalf of the appellant, paid the amount covered by the said bills by an 'account payee' cheque on the Reserve Bank of India drawn in favour of the appellant which was delivered to the person purporting to have authority to receive payment on behalf of the appellant. The respondent thus alternatively pleaded satisfaction of the claim, and so, urged that the appellant had no cause of action for the suit. On these pleadings, seven substantive issues were framed by the learned trial judge. Issues I & 2 which were framed in respect of the jurisdiction of the Court were not pressed by the respondent, and so, no findings were recorded on them. On issue No. 3 the learned trial judge found that the contract on which the appellant based his claim was invalid and unenforceable. Issue No. 4 in regard to the alleged payment of the bills was found against the respondent. On issue No. 5, the trial Court held that the respondent was bound to pay -to the appellant the amount claimed by way of compensation. Issue No. 6 which was raised by the respondent under s. 80 of the Code of Civil Procedure was not pressed, and therefore, no finding was recorded on it, Issue No. 7 which was framed on the appellant's allegation that its claim had been admitted by the respondent was answered against the appellant. In the result, the main finding on issue No. 5 decided the fate of the suit and since the said finding was in favour of the appellant, a decree was passed directing the respondent to pay to the appellant Rs. 20,030/81-. This amount, according to the decree, had to carry interest at the rate of 6 Percent per annum.

This decree was challenged by the respondent by an appeal before a Division Bench of the said High Court. The appeal was heard by P. B. Mukarji and Bose JJ. Both the learned judges agreed that the respondent's appeal should be allowed and the appellant's claim dismissed with costs, but their decision was based on different grounds. Bose J. held that the contract sued on was invalid and that the claim made by the appellant for compensation under s. 70 of the Indian Contract Act was not sustainable. He also found that the appellant's contention that the said contract which was initially invalid had been duly ratified, had not been proved. it is on these grounds that Bose J. came to the conclusion that the appellant's claim could not be granted. Incidentally, it may be added that Bose J., was not prepared to consider the plea of negligence which was raised by the respondent for the first time in appeal.

Mukarji, J., who delivered the principal judgment of the Appeal Court agreed with Bose J. in holding that the contract was invalid and s. 70 was inapplicable. He, however, took the view that the said contract had been duly ratified and so, he proceeded to examine the question as to whether the appellant's claim was justified on the merits. On this part of the case, the learned judge took the view that even if both the appellant and the respondent. dent were held to be innocent, since the respondent Appeal dismissed.

had actually parted with the money, the appellant was not entitled to require the respondent to pay over the said money again, because he thought that as held by Ashhurst J. in Lickbarrow v. Mason (1), it was a well recognised principle of law "that whenever one of two innocent per-sons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it." In the opinion of the learned judge, the intimation card had been duly sent by post by the respondent to the appellant and the fact that the said intimation card went into unauthorised hands of dishonest persons who used it fraudulently for the purpose of obtaining a cheque for the amount in question from the respondent, showed that the appellant had by his negligence enabled the said fraudulent persons to secure the cheque, and so, it was not open to the appellant to claim the amount from the respondent. It is on these grounds that Mukharji, J., allowed the appeal and dismissed the appellant's suit with costs. It is against this judgment and -degree that the appellant has come to this Court with a certificate granted by the said High Court. In the courts below, elaborate arguments were urged by the a ties on the question as to whether the contract, the subject-matter of the Suit, was invalid and if yes, whether a claim for compensation made by the appellant could be sustained under s. 70 of the Indian Contract Act. Both these questions are concluded by a recent decision of this Court in the State of We,-RI Bengal v. MIS. B. K. Mondal & Sons (2). As a result of this decision, there can be no doubt that the contract on which the suit is based is void and unenforceable, and this part of the decision is against the appellant. It is also clear under this decision that if in pursuance of the said void contract, the appellant has performed his part and the respondent has received the benefit of the performance of the contract by the appellant,

(1) 2 T. R. 63, 70.

(2) [1962] Supp. 1 S.C.R. 876.

section 70 would justify the claim made by the appellant against the respondent. This part of the decision is in favour of the appellant. It is therefore unnecessary to deal with this aspect of the

matter at length. Assuming then that the appellant is entitled to claim the amount from the respondent, two questions still remain to be considered. The first question is whether the intimation card on the production of which the respondent always proceeded to' issue a cheque against the bills received by it from the appellant, was received by the appellant or not, and if this question is answered in the affirmative, the other question which will call for our decision is whether by virtue of the fact that after the intimation card had been duly posted by the respondent to the appellant it fell into dishonest hands and was fraudulently used by some persons, that would create an impediment -in the way of the appellant's claim on the ground that the appellant was negligent and his negligence creates estoppel. Before addressing ourselves to these questions, it would be necessary to set out the material facts as to the dispatch of the intimation card and the fraudulent use which was made of it by persons in whose hands the said card appears to have fallen. It appears that according to the ordinary course of business, on receiving the bills from the appellant, the respondent used to send an intimation card to the appellant and the said card had to be sent back by the appellant with a person having the authority of the appellant to receive the payment and when it was so produced before the respondent, a cheque used to be issued. In the present case, it is common ground that a bill was sent by the appellant to the respondent making a total claim of Rs. 20,343/8/- on August 18, 1949. Thereafter, on October 10, 1949, the respondent sent the intimation card to the appellant addressed at its place of business 135, Canning Street, Calcutta. This card intimated to the appellant that its claim for the amount specified in its bill would be paid on presentation of a proper receipt and authority between 11 A.M. to 3 P.M. on ordinary days and between 11 A.M. to 1 P. M. on Saturdays. Along with the card, a form of the receipt was sent and the appellant was asked to sign it. This intimation card was duly posted. Later, one Mr. B. L, Aggarwal produced the intimation card before the respondent. In doing so he produced an endrosement which purported to show that the appellant had authorised him to receive the payment on its behalf. When the intimation card with the appropriate authority was shown to the respondent, Mr. Aggarwal was asked to pass a receipt and when the receipt was passed in the usual form, an 'account payee' cheque for the amount in question was given to him. Mr. Aggarwal took the cheque and left the respondent's office. Meanwhile, it appears that some persons had entered into a conspiracy to make fraudulent use of the intimation card which had gone into their custody. In order to carry out this conspiracy, they purported to form a limited company bearing the same name as that of the appellant. A resolution purported to have been passed by the Directors of this fictitious company on October 17, 1949 authorised the opening of an account in favour of the Company in the United Commercial Bank Ltd., Calcutta. This resolution purported to be signed by the Chairman of the Board of Directors Mr. Abinash Chander Chatterji. Armed with this resolution an, application was made to open an account in the United Commercial Bank Ltd., and while doing so, the Articles of Association purporting to be the Articles of the said fictitious Company were produced and the account was opened with a cheque of Rs. 500/- on October 27, 1949. On October 26, 1919, the cheque received from the respondent was credited in the said account, and as was to be expected, withdrawals from this account, began in quick succession, with the result that by November 1, 1949, only Rs. 68/- were left in this account. That, in brief, is the story of the fraud which has been committed in respect of the cheque issued by the respondent to the appellant for the bill dated August 18, 1949.

In the Courts below, the appellant denied that it had received the intimation card from the respondent,and it was alleged on its behalf that in delivering the cheque to the person who presented the said card with the authority purporting to have been issued by the appellant, it cannot be said that the respondent bad given the cheque to any person authorised by the appellant, and so, the appellant was justified in saying that it had not received the payment for its bill. In support of its case, the appellant examined its Director., Mr. Parikh and its officer, Mr. Bhat. The respondent led no oral evidence; it, however, relied on the fact that the intimation card bore the postal mark which showed that it had been posted and it was urged that the said postal mark raised a presumption that the card which had been duly posted in the Post office must have, in ordinary course, reached the addressee. The trial Court noticed the fact that the intimiation card did not bear a corresponding delivery mark as it should have, and it took the view that the onus was on the respondent to show that the said card had in fact been delivered to the appellant. It then considered the oral evidence adduced by the appe- llant and having regard to the fact that. no evidence had been led by the respondent, it came to the conclusion that the respondent had failed in showing that the intimation card had been duly delivered to the appellant. Substantially ' it is on the basis of this finding that the decree was passed by the trial Court in favour of the appellant.

In appeal, Mukarji, J. took the view, and we think., rightly, that the posting of the card having been duly proved, a presumption arose that it must have been delivered to the addressee in ordinary course. He also considered the oral evidence given by Mr. Parikh and Mr. Bhat and was not satisfied that it was trustworthy. In particular, the learned judge was inclined to take the view that Mr. Parikh's statement that his office did not employ any dispatch clerk and did not keep any Chiti note-book like the Inward and Outward Register was unbelievably. In the result, he made a finding that the appellant was negligent in receiving, arranging, recording and dealing with letters addressed to it.

The position of the evidence in respect of this point is no doubt unsatisfactory. It appears that Mr. Parikh who is the Director of the appellant Company since 1948 is also the Director of K. Wara Ltd. which manages eight collieries like that of the appellant. K. Wara Ltd., has its office at 135, Canning Street. The appellant Company also has one office at the said place. A Post Box in which letters addressed to the appellant and K. Wara Ltd. could be dropped has been kept on the ground floor of the building in which the said offices are situated. The said Post Box is locked and naturally the key is given to one or the other of the Peons to open the said Box and take out the letters and deliver them to Mr. Parikh Mr. Parikh's evidence shows that his denial that be had received any intimation card could not be accepted at its face value for two reasons; the first was that even if the intimation card had been received by the Peon and had not been delivered by him to Mr. Parikh, Mr. Parikh would not know that the card had been received and though his statement that he did not get the card may be literally true,, it would not be true in the sense that the card had not been delivered to the appellant Company. Besides., Mr. Parikh's statement that he did not employ any dispatch clerk and kept no inward or outward register is prima facie unbelievable, and so, Mukarji J.was inclined to hold that the intimation card may have been received by the appellant Company.Having made this finding, Mukarji J. proceeded to examine the true legal position in regard to the appellant's claim, and as we have already observed,he held that since the appellant was guilty of negligence which facilitated the commission of the offence by some strangers,it was precluded from making a

claim against the respondent.As we have already seen, Bose, J. has put his decision on the narrow ground that the contract was invalid and s. 70 did not help the appellant. That ground, however, cannot now sustain the final conclusion of Bose,J., in view of the recent decision of this Court in the case of M/s. B. K. Mondal & Son's(1). Therefore, in dealing with the present appeal,we will assume that the finding recorded by Mukarji J., is correct and that the intimation card sent by the respondent to the appellant can be deemed to have been delivered to the appellant. The question which arises for our decision then is:if the intimation card was thereafter taken by somebody else and fraudulently used,does that create an estoppel against the appellant in regard to the claim made by it in the present case ?

In dealing with this point, it is necessary to bear in mind that though the evidence given by Mr. Parikh may be unsatisfactory and may.justify the conclusion that despite his denial, the intimation card may have been delivered to Mr. Parikh, it is not the respondent's case that Mr. Parikh deliberately allowed either one of his employees or somebody else to make fraudulent use of the said intimation card. In other words, we must deal with the point of law raised by the appellant on the basis that Mr. Parikh had no connection whatever with the (1) [1962] Supp. 1 S.C.R. 876.

fraud committed on the respondent and that whoever obtained the intimation card from Mr. Parikh's office and used it for a fraudulent purpose acted on his own without the knowledge or consent of Mr. Parikh. The short question which falls to be considered is if the arrangement for keeping the intimation card in safe custody was not as good and effective as it should have been and somebody managed to pilfer the said card, does it justify the respondent's case that the appellant was negligent and by virtue of its negligence, it is estopped from making the present claim ? In dealing with this question, it is necessary to remember that the plea of negligence on which estoppel was pleaded by the respondent against the appellant had not been alleged in the written statement. It is remarkable that the pleadings of both the parties completely ignored the fact known to both of them before the present suit was filed that a cheque had been issued by the respondent and had been fraudulently used by some strangers. The appellant in its plaint does not refer to the issue of the cheque and its fradulent use and makes a claim as though the respondent had not honoured the bill submitted to it by the appellant; whereas the respondent in its written statement ignores the fact that the cheque had not been received by the appellant but had been fraudulently obtained and encashed by some other persons. That being the nature of the pleadings filed by the parties in the Trial Court, neither party pleaded any negligence against the other. It is true that both the parties argued the point of negligence against each other in the appellate Court. The appellant urged that the respondent should not have delivered the cheque to the person who presented the bill and the intimation card because a stamped receipt had not been produced by the said person as it should have been; the appellant's case was that it was usual that a stamped receipt had to be produced alongwith the intimation card by a person duly authorised by the appellant before the cheque was delivered to him and since without a stamped receipt the cheque had been delivered, the respondent was guilty of negligence. This point has been rejected by Mukarji J., but that is another matter. On the other hand, the respondent pleaded that the appellant was negligent inasmuch as the intimation card which had been sent to it and which must be presumed to have been delivered to it fell into the hands of strangers owing to the negligent manner in which it was handled after it was delivered in the Letter Box of the appellant in 135, Canning Street, Calcutta. As we have already noticed, Bose, J.,

refused to entertain the plea of negligence urged by both the parties, whereas Mukarji J., considered it and made a finding in favour of the respondent and against the appellant.

Mr. Setalvad contends that a plea of negligence should have been raised by the respondent in its pleadings and the appellate Court was, therefore, in error in allowing such a plea to be raised for the first time in appeal. In our opinion, there is some force in this contention. Negligence in popular language and in common sense means failure to exercise that care and diligence which the circumstances require. Naturally what amounts to negligence would always depend upon the circumstances and facts in any particular case. The nature of the contract, the circumstances in which the performance of the contract by one party or the other was expected, the degree of diligence, care and attention which, in ordinary course, was expected to be shown by the parties to the contract, the circumstances under which and the reason for which failure to show due diligence occurred are all facts which would be relevant before a judicial finding can be made on the plea of negligence. Since a plea of negligence was not raised by the respondent in the trial Court, the appellant is entitled to contend that it had no opportunity to meet this plea and dealing with it in appeal has, therefore, been unfair to it. Apart. from this aspect of the matter, there is another serious objection which has been taken by Mr. Setalvad against the view which prevailed with Mukarji, J. He argues that when a plea of estoppel on the ground of negligence is raised, negligence to which reference is made in support of such a plea is not the negligence as is understood in popular language or in common sense ; it has a technical denotation. In support of a plea of estoppel on the ground of negligence, it must be shown that the party against whom the plea is raised owed a duty to the party who raises the plea. just as estoppel can be pleaded on the ground of misrepresentation or act or omission, so can estoppel be pleaded on the ground of negligence ; but before such a plea can succeed, negligence must be established in this technical sense . As Halsbury has observed : "before anyone can be estopped by a representation inferred from negligent conduct, there must be a duty to use due care towards the party misled, or towards the general public of which he is one (1)." There is another requirement which has to be proved before a plea of estoppel on the ground of negligence can be upheld and that requirement is that "the negligence on which it is based should not be indirectly or remotely connected with the misleading effect assigned to it but must be the proximate or real cause of that result (2)." Negligence, according to Halsbury, which can sustain a plea of estoppel must be in the transaction itself and it should be so connected with the result to which it led that it is impossible to treat the two separately. This aspect of the matter has not been duly examined by Mukarji J. when he made his finding against the appellant.

(1) Halsbury's Laws of England Vol. 15, page 243. par& 451. (2) Halsbury's Laws of England Vol. 15 page 245 para 453, Mukarji, J. thought that the principle laid down by Ashhurst, J. in the case of Lackbarrow (1), was a broad and general principle which applied to the facts in the present case. It may be conceded that as it was expressed by Ashhurst, J., in the case of Lickbarrow, the proposition no doubt has been stated in a broad and general manner. Indeed, the same proposition has been affirmed in the same broad and general way by the Privy Council in Commonwealth Trust Ltd. v. Akotey (2). In that case, the respondent who was a grower of cocoa in the Gold Coast Colony, consigned by railway 1050 bags of cocoa to L., to whom he had previously sold cocoa. Before a difference as to the price had been settled L. sold the cocoa to the appellants and handed the consignment notes to their agent, who reconsigned the cocoa to the appellants. The appellants

bought in good faith and for the full price. The respondent then sued the appellants for damages for conversion. It was held by the Privy Council that by his conduct the respondent was precluded from setting up his title against the appellants, and so his claim was rejected. In support of the view taken by the Privy Council, reliance was placed on the well-known statement of Ashhurst, J., in the case of Lickbarrow) 1), and so, it may be conceded that the broad principle enunciated by Ashhurst,J., received approval from the Privy Council.

Subsequently, however, this question has been elaborately examined by the Privy Council in Mercantile Bank of India Ltd. v. Central Bank of India Ltd., (1), and the validity of the broad and general proposition to which we have just referred has been seriously doubted by the Privy Council. Lord Wright who delivered the judgment of the Board, referred to the decision in the case of Lickbarrow (1), and observed "'that it may well be that there were facts in that case not fully elucidated in the report which would justify the decision; but on the (1) 2 T.R. 63, 70. (2) [1926] A.C. 72.

(3) (1937) L.R. 65 I.A. 75, 86, face of it their Lordships do not think that the case is one which it would be safe to follow." Then reference was made to the opinion of Lord Sumner in the case of R . E. Jones Ltd. v. Waring & Gillow Ltd., (1) where the principle enunciated by Ashhurst J. was not accepted, because it was held that the principle of estoppel must ultimately depend upon a duty. Lord Lindley similarly in Farquharson Bros. & Co. v. King & Co. (2), pointed out that the dictum of Ashhurst J. was too wide. A similar comment has been made as to the said observation by other judges to which Lord Wright has referred in the course of his judgment. It would thus be seen that in the case of The Mercantile Bank of India Ltd. (3 ) the Privy Council has seriously doubted the correctness of the broad observations made by Ashhurst J, in the case of Lickbarrow (4), and has not followed the decision in the care of Commonwealth Trust Ltd. (5). Therefore, it must be held that the decision of Mukarji J, which proceeded on the basis of the broad and unqualified proposition enunciated by Ashhurst, J., in the case of Lickbarrow cannot be sustained as valid in law. There arc two other decisions to which reference may usefully be made in considering this point. In Arnold v. The Cheque Bank, (6), Lord Coleridge, C.J., in dealing with the question of negligence, observed that "no authority whatever had been cited before them for the contention that negligence in the custody of the draft will disentitle the owner of it to recover it or its proceeds from a person who has wrongfully obtained possession of it. In the case before them, there was nothing in the draft or the endorsement with which the plaintiff had anything to do, calculated in any way to mislead the defendants. It was regularly endorsed and was then enclosed in a letter to the plaintiffs correspondents, to be sent through the post. There could be no negligence in relying on the honesty of their (1) (1926) A.C. 670.

(2) [1902] A.C. 325.

(3) (1937) L.R, 65 I.A. 75, 86.

(4) 2 T. If. 63, 70.

(5) [1926] A.C. 72.

(6) (1876) C P.D. 578, 588, servants in the discharge of their ordinary duty, that of conveying letters to the post; nor can there be any duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed were a notorious thief." These observations illustrate how before invoking a plea of estoppel on the ground of negligence, some duty must be shown to exist between the parties and negligence must be proved in relation to such duty. Similarly, in Baxendale v. Bennett, (1) Bramwell, L.J., had occasion to consider the same point. In that case, the defendant gave H. his blank acceptance on a stamped paper and authorised H. to fill in his name as drawer. H. returned the blank acceptance to the defendant in the same state in which he received it. The defendant put it into a drawer of his writing table at his chambers, which was unlocked, and it was lost or stolen. C. afterwards filled in his own name without the defendant's authority, and an action was brought on it by the plaintiff as endorsee for value. The court of Appeal held that the defendant was not liable on the bill. Dealing with the question of negligence attributed to the defendant, Bramwell L.J. observed that "the defendant may have been negligent, that is to say, if he had the paper from a third person, as a bailee bound to keep it with ordinary care, he would not have kept it in a drawer unlocked." But, said the learned judge, this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion, and so, it was held that the defendant was not liable on the bill. This decision shows that negligence must be based on a duty owed by one party to the other and must, besides, be shown to have been the proximate or the immediate cause of the loss.

It is in the light of this legal position that the question about estoppel raised by the respondent (1)) (1878) 3 Q,. B. D. 525, 530.

against the appellant in the Appellate Court may be considered. Can it be said that when the appellant received the intimation card, it owed a duty to the respondent to keep the said card in a locked drawer maintaining the key all the time with its Director? It would not be easy to answer this question in the affirmative; but assuming that the appellant had a kind of duty towards the respondent having regard to the fact that the intimation card was an important document the presentation of which with an endorsement as to authorisation duly made would induce the respondent to issue a cheque to the person presenting it, can the Court say that in trusting its employees to bring letters from the letter box to the Director, the appellant had been negligent ? As we have already observed, in dealing with the present dispute on the basis that the intimation card bad been dropped in the letter box of the appellant, it is possible to hold either that the said card was collected by the Peon and given over to Mr. Parikh, or it was not. In the former case, after Mr. Parikh got the said card, it had been removed from Mr. Parikh's table by someone, either by one of the employees of Mr. Parikh or some stranger. In the latter case, though, technically, the card had been delivered in the latter box of the appellant, it had not reached Mr. Parikh. In the absence of any collusion between Mr. Parikh and the person who made fraudulent use of the intimation card, can the respondent be heard to say that Mr. Parikh did not show that degree of diligence in receiving the card or in keeping it in safe custody after it was received as he should have ? In our opinion, it would be difficult to answer this question in favour of the respondent. In ordinary course of business, every office that receives large correspondence keeps a letter box outside the premises of the office. The box is locked and the key is invariably given to the Peon to collect the letters after they are delivered by Postal Peons. This course of business proceeds on the assumption which must inevitably be made

by all businessmen that the servants entrusted with the task of collecting the letters would act honestly. Similarly, in ordinary course of business, it would be assumed by a businessman that after letters are placed on the table or in a file which is kept at some other place, they would not be pilferred by any of his employees. Under these circumstances, if the intimation card in question was taken away by some fraudulent person, it would be difficult to hold that the appellant can be charged with negligence which, in turn, can be held to be the proximate cause of the loss caused to the respondent. In our opinion, therefore, Mukarji.J. was in error in holding that the respondent could successfully plead estoppel by negligence against the appellant. As we have already observed, the question as to whether the claim made by the appellant against the respondent under S. 70 is concluded by the decision of this Court in the case of M/s. B. K. Mondal & Sons (1), in favour of the appellant, and so, it must be held that the Division Bench of the High Court erred in dismissing the appellant's claim.

The result is, the appeal is allowed., the decree passed by the appellate Court is set aside and that of the trial Court restored with costs throughout.

Appeal allowed.

[1962] Supp. I. S. R. 876 .