HIGH COURT OF MADHYA PARADESH

BENCH AT GWALIOR

SINGLE BENCH:

HON. SHRI JUSTICE ANAND PATHAK

First Appeal No.42/2003
Indian Overseas Bank Vs. Hari Shankar Sharma and Another

Shri D.S. Chauhan, learned counsel for the appellant.
Shri M.P. Agrawal, learned counsel for respondent No.2/Bank.

JUDGMENT

(Delivered on this 29th of November, 2016)

This first appeal under Section 96 of CPC has been preferred by the appellant/plaintiff against the judgment and decree dated 28/08/2002 passed by V Additional District Judge, Gwalior in Civil Suit No.10-B/1998 wherein the suit preferred by the appellant/plaintiff has been partially decreed. As per the judgment and decree passed by the trial Court, liability to pay the amount of Rs.2,96,400/- is over respondent No.1/defendant No.1.

2. The grievance of the appellant/plaintiff is in respect of exoneration of respondent No.2/defendant No.2 of the case in hand from the liability.

3. Facts of the case in brief are that on 13/01/1995, one Demand Draft vide No.OL/85/MA/470590-165 dated 13/01/1995 for Rs.88,500/- as well as on dated 17/02/1995, another Demand Draft vide No.OL/85/MA/470596-122 dated 17/02/1995 for Rs.94,700/- were alleged to have been issued by Sadak Dudhali Branch District-Saharanpur (U.P.) and were presented by respondent No.1 before respondent No.2/Bank for collection through clearing by the appellant. The appellant paid proceeds of these demand drafts to respondent No.2 in the usual course of banking business. Amount contended in the demand drafts were paid to respondent No.1.

4. On 11/07/1995, the Regional Officer of the appellant/Bank directed respondent No.2/Bank to send the details of the abovesaid two demand drafts and to keep the abovesaid demand drafts in safe custody because certain irregularities were purportedly found. Thereafter, inquiry was made from Sadak Dudhali Branch, Saharanpur regarding these demand drafts and intimated to higher echelon that these demand drafts have not been issued by the said Branch and they were forged. Later on, it was revealed that these demand drafts were prepared from the Indian Overseas Bank, Mai Branch (District-Mathura) i.e. appellant/Bank by affixing seal of Sadak Dudhali Branch District-Saharanpur and putting forged signatures of two officers over that. A police complaint was made at police station-Jayendragaj, Lashkar Gwalior in this regard.

5. Appellant/Bank sent letters to respondent No.2/Bank to pay the amount of these demand drafts alongwith interest thereon, as according to the appellant/Bank, respondent No.2/Bank was not entitled to get their payment and therefore, respondent No.2/Bank was bound to return its proceeds.

6. When respondent No.2/Bank did not return the amount so demanded by the appellant/Bank, then a suit for recovery of Rs.2,96,400/- was filed against the appellant/Bank as well as the beneficiary i.e respondent No.1.

7. Respondent No.1 neither appeared before the trial Court nor contested the suit whereas respondent No.2/Bank contested the suit and alleged that payments of the abovesaid drafts were made after due inquiry and verification and according to the rules of the clearing house, no statements of the account has been produced by the appellant/Bank, therefore, respondent No.2/Bank is not liable to pay any amount. Plea of limitation as well as arbitrary charging of interest has also been raised. It was alleged by respondent No.2/UCO Bank that appellant has not come with clean hands.

8. The trial Court on the basis of pleadings and the documents so relied upon by the parties, framed as many as seven issues.

Appellant and respondent No.2 examined their witnesses and produced the relevant documents. Two officers of Bank were examined by the appellant as plaintiff's witnesses, whereas respondent No.2/UCO Bank has examined the sole witness i.e. present manager of the UCO Bank.

9. The trial Court decreed the suit against respondent No.1 but dismissed the same against respondent No.2/UCO Bank, therefore, the instant appeal has been preferred by the appellant/Bank.

10. Learned counsel for the appellant/Bank, while drawing the attention of this Court over the provisions as contained in Section 131 of the Negotiable Instrument Act, 1881 (for brevity “the Act”), submitted that it was the liability of the banker to verify due care at the time of deposit of demand drafts in their bank. But, no due care has been taken by respondent No.2/Bank at the time of deposit of drafts, therefore, appellant/Bank is liable for recovery of damage from respondent No.2/Bank. Even after the incident occurred, respondent No.2/Bank did not take any action against respondent/defendant No.1 to bring him to the books or to cooperate with the police authorities in investigation and prosecution of respondent No.1.

11. He relied upon the discussion as rendered in para 13 of the trial Court judgment. He further relied upon the judgment rendered by the Hon'ble Apex Court in the matter of **The Kerala State Co-operative Marketing Federation Vs. State Bank of India and Others, 2004 (II) BC (1) (SC)** as well as the judgment of Delhi High Court in the matter of **State Bank of India Vs. Punjab National Bank, I (1996) BC 251** and judgment of Madras High Court in the matter of **United Bank of India, Madras Vs. Bank of Baroda, Madras, AIR 1997 Madras 23.**

12. On the other hand, learned counsel for respondent No.2/UCO Bank submits that after the alleged incident of theft or mishandling of drafts, no document or letter has been sent by the appellant/Bank

to respondent No.2/UCO Bank intimating the alleged fraud incident and therefore, no adverse inference against respondent No.2/UCO Bank can be drawn. He submits that no report has been submitted in respect of incident by the appellant/Bank.

13. Further submission of respondent No.2 is that UCO Bank is the mediator only, who is acting as conduit between appellant/Bank and respondent No.1, therefore, no recovery can be made from respondent No.2/UCO Bank. His another ground for contest is that appellant/plaintiff/Bank itself has not taken due caution after the drafts got stolen from the concerned bank. Neither any information was given by the appellant/Bank to the concerned branches of the same bank, nor any steps have been taken to intimate the vigilance cell of the Indian Bank Association in respect of alleged fraud incident. Similarly, no police investigation was persuaded by the appellant/Bank, therefore, it was the negligence on the part of the appellant/Bank, which cost it so dearly. He relied upon para-14 of the trial Court judgment.

14. Heard the learned counsel for the parties and with their assistance perused the record.

15. The appellant has come out with a case regarding alleged negligence of respondent No.2/Bank wherein the said bank has sent the demand drafts for encashment to the appellant/Bank without due caution. The appellant has relied upon the provisions as contained in Section 131 of the Negotiable Instrument Act, 1881 which reads as under:-

> *"**131. Non-liability of banker receiving payment of cheque:-** A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of cheque by reason only of having received such payment."*
> *[(Explanation I.] A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his*

customer's account with the amount of the cheque before receiving payment thereof.]
[Explanation II.] It shall be the duty of the banker who receives payment based on an electronic image of a truncated cheque held with him to verify the prima facie genuineness of the cheque to be truncated and any fraud, forgery or tempering apparent on the face of the instrument that can be verified with due diligence and ordinary care.]".

16. The Bank normally has an obligation to collect the customer's cheque (Demand Drafts in the present case) paid into his account. In Halsbury's law of England, 4th edn., Vol.3 at para 46 we read:-

> ***46. Customer's title to money paid in:-*** *In the absence of notice, express or implied the banker is not concerned to question the customer's title to money paid in by him, although if a person entrusted with a cheque wrongfully pays it to the Bank to the credit of someone who is not entitled to it, the true owner, if he has given notice to the Bank of his title while the credit remains, may recover the amount from the Bank as money had and received; or as damages for conversion'.*
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> *A banker should be very cautious in accepting for a customer's account any cheque drawn by him as agent upon his principal's account, however broad may be the authority to draw. If the Court detects circumstances which should arouse suspicion that the agent was abusing the authority, the banker will be liable to the principal even though the cheque was crossed."*
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> *In capital and Counties Bank Vs. Gordon, 1903 AC 240:88 LT 574;89 TLR 402:8 Com Cas 221 (as referred in Seventh Edition of Law relating to Negotiable Instruments Orient Publishing Company):- the House of Lords accepted the position that a Bank*

acts basically as a mere agent or conduit pipe to receive payment of the cheques from the banker on whom they were drawn and to hold the proceeds at the disposal of its customer. Unless crossed the banker himself was the holder for value. He may be a sum collecting agent or he may take as holder for value or as holder in due course. As an agent of the customer for collection he was bound to exercise diligence in the presentation of the cheques for payment within reasonable time. If a banker fails to present a cheque within a reasonable time after it reaches him, he was liable to his customer for loss arising from the delay. A banker receiving instruments paid in for collection and credit to a customer's account may collect solely for a customer or for himself or both. Where he collects for the customer he will be liable in conversion if the customer had no title. However, if he collects in good faith and without negligence he may plead statutory protection under Section 131 of the Act."

17. Normally the principles governing the question of banker's negligence are four in numbers reads as under:-

(1) the standard of care required of bankers is that to be derived from the ordinary practice of bankers;

(2) the standard of care required of bankers does not include the duty to subject an account to microscopic examination;

(3) in considering whether a Bank has been negligent in receiving a cheque and collecting the money for it, it has presumably to scrutinize the circumstances in which a Bank accepts a new customer and opens a new account.

(4) the onus is upon the Bank to show that it acted

without negligence.

18. Bearing these principles in mind, this Court had to see whether respondent No.2/Bank had acted with negligence while acting as a banker for respondent No.1.

19. From the evidence led by the appellant through PW-1 and PW-2, it is revealed that the appellant/Bank has not produced any documents which could demonstrate the response of the appellant/Bank as well as the Mai Branch Mathura from where the demand draft were stolen.

20. In normal practice and procedure, once the demand draft is stolen from any bank then the concerned bank immediately intimates the same to the higher authorities, which in turn circulate the message to all the branches regarding theft/misplacing of draft. This intimation goes to the vigilance cell and the related cell of Indian Bank Association so that it can be circulated to all the concerned banks. At times (although not always), news is flashed through paper publications also. The appellant/Bank as plaintiff has not brought on record the steps taken by it after the demand drafts were stolen from the branch at Mathura as well as the steps taken after the fraud has been detected. The appellant/Bank has also not explained the fate regarding police investigation, which was vital in the present controversy. The police authority, after investigation could have reached to the account holder and the person who had introduced him in the bank at respondent No.2/UCO Bank. The loss was of appellant/bank and therefore, it was the duty of the appellant/bank to have exerted the pressure and persuasion over the investigating authorities to reach to the ultimate beneficiary i.e. respondent No.1. Interestingly, in the police investigation, respondent No.1 could not be traced out nor he could be served in the present litigation and remained *ex-parte*, taking away all the benefits.

21. In para 13 of the trial Court judgment, PW-1-Heeralal Mankele has admitted the fact regarding non submission of letters sent to

respondent No.2/Bank. This omission reflects over the appellant/plaintiff.

22. In para-14 the said judgment, witness (PW-1) has also accepted the fact that no police complaint has been made by the Mai Branch, Mathura i.e. appellant/Bank in respect of missing/theft of demand drafts.

23. In para-15 to 22 of the trial Court judgment, the discussion reveals that the appellant/Bank tried to fasten the liability over respondent No.2/Bank only on the basis of the fact that respondent No.1 was the account holder of respondent No.2/UCO Bank. Respondent No.2/UCO Bank through the documents produced and evidence led has dislodged the presumption about the conduct of the bank.

24. Respondent No.1 had opened the bank account in the year 1991 in respondent No.2/Bank and the account was regularly operated till the time of incident in the year 1995. Therefore, respondent No.2/Bank never had any occasion to doubt the credibility/authenticity of respondent No.1. Therefore, at the time of presentation of demand drafts in the respondent No.2/UCO Bank, the same were forwarded to the appellant/Bank under the usual course of business. It is worth mentioning the fact that the said demand drafts were not fabricated or forged one but actually were stolen demand drafts from the Mai Branch of appellant/Bank and later on misused by putting signatures of two Bank Officers over the drafts. In fact, in the clearing house of the appellant/Bank, the said tempering/fabrication should have been brought to the notice of the officer of the clearing house or the clearing house at the threshold; could have raised the doubt over the alleged tempering/fabrication and could have returned the cheque without any payment being made. Therefore, the conduct of the appellant/bank was full of negligence and casualness.

25. The true legal position that emerges regarding the liability of a banker and the protection available under Section 131 of the Act,

from the various decisions of the Privy Council and the Courts of India can be reiterated as follows:-

> *"Section 131 of the Instrument act gives the immunity to the banker when the banker acts in good faith and without negligence. In other words, in the present case, respondent No.2/Bank was having onus to prove that it acted in good faith and without any negligence. [Here, in the present case, the customer i.e. respondent No.1 had opened an account way back in the year 1991. The account was regularly operated, therefore, there was nothing suspicious about the manner in which the account was opened and therefore, the bank never had any occasion to doubt the credibility of the customer as prospective con-man].*
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> *Since the statutory duty contemplated under this Section takes the form of a qualified immunity from a strict liability at common law, the onus of showing that he did take such reasonable care lies upon the defendant banker. The essential condition, that is, the duty to take care is purely one imposed by the statue on the Banker for the benefit of the true owner, as between whom there is no contractual relation giving the rise to a duty. It is the price which the banker pays for the protection afforded by the statue. It is therefore, from the stand point of the true owner, that the question of good faith and absence of negligence has to be considered.*
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> *The question whether the bank had acted with negligence in the opening of the account will, however, be relevant under Section 131 to this extent that if the opening of the account and the deposit of the cheque are really part of one scheme, as where*

the account itself is opened with the cheque in question or where it is put into accounts, accounts, so shortly after the opening of the account as to lead to the inference that it is part of it, then negligence in the matter of opening the account must be treated as negligence in the matter of realisation of the cheque. It might happen that even where an account is opened without a proper enquiry it might continue to be operative upon satisfactorily for some time, but long afterwards a cheque might put into the account which might turn out to be forged. In such a case it cannot be laid down that on an inexorable rule that negligence in the opening of an account must be treated as negligence in the receipt of the amount of the cheque. The question would then be one of fact as to how for two stages can be regarded as so intimately associated as to be considered as one transaction.

The decision in (1896) 1 Queen's Bench 7 (London and River Plate Bank Vs. Bank of Liverpool) is a case where it was held that when a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money paid cannot be recovered from the holder, although endorsements on the bill were subsequently found to be forgeries. The ratio of this decision would show that it proceeded on the vital premise and basis that the money was paid in good faith and received also in good faith."

26. Thus, from the facts and records available in the case, it appears that bank has sufficiently discharged the onus of acting in

good faith and without negligence.

27. Therefore, on the basis of aforesaid discussion, the negligence of respondent No.2/UCO Bank is not sufficiently proved so as to fasten the liability over the UCO Bank. In fact, its was respondent No.1 who was the mischievous element, but unfortunately got scot free because of negligence shown by both the parties in part.

28. It is a position that indicates when parties involved in an action are equally culpable for the fault then the parties to such legal controversy are ***In Pari Delicto***, neither can obtain affirmative relief from the Court since both are at equal fault or of equal guilt. The said legal principle reflects that if two parties in a dispute are at equal fault then the party in possession of the contested property gets to retain it or in other words, Court will not interfere with the *status quo*. Thus, it appears that in the present case, both the parties (rather all three) to the *lis* stood ***In Pari Delicto*** and both (all) are to be blamed and thus, the Court will not side with either party.

29. The judgment as relied upon by the appellant/Bank in the matter of The Kerala State Co-operative (supra), is not applicable in the present case because the facts of that case are distinguishable vis a vis the present case wherein the said case, cheque in question was stolen in post and was altered to read as if it was payable to some other person and the said person pretending himself opened a bank account and defrauded the bank therefore, a fictitious person was the main culprit. In the present case, the trial Court has already passed a decree against respondent No.1, therefore, negligence in the present case cannot be attributed to respondent No.2/Bank, thus the said case moves in different factual realm.

30. Similarly, the facts of the case of State Bank of India (supra) are also different, as it was the case of forged cheque wherein the collecting branch of Punjab National Bank did not show enough caution in dealing with the beneficiaries of the said cheque whereas

the land acquisition Collector has informed about the cheque being stolen. Therefore, in the said prevailing circumstances, the negligence of the Bank has been found to be proved. Here, in the present case, no such factual matrix is available.

31. The controversy of the case of United Bank of India, Madras (supra) is also different, it is a case of forgery and interpolation whereby writings on the instrument have been chemically erased and the subsequent writings have been inserted in favour of the beneficiaries alongwith the amount. Here, in the present case no such facts exist.

32. The judgments rendered by the Hon'ble Apex Court as well as the High Court cannot be read as statue. They are to be applied in the given facts and circumstances.

33. Another submission of the appellant is in respect of Section 72 of the Indian Contract Act. According to him as per the said provision, respondent No.2/UCO Bank should have returned the money to the appellant/Bank. Section 72 of the Act reads as under:-

> ***"72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion****.—A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."*

34. Here in the present case, drafts of the appellant/Bank have been stolen from the Mai Branch of District-Mathura, therefore, it was incumbent upon the plaintiff/appellant to perform due caution. Therefore, the plea of Section 72 of the Contract Act does not come to the rescue of the appellant. Here the amount has not been paid under coercion, nor the money is paid by mistake. Demand drafts were sent for collection in due course of business. Therefore, negligence cannot be attributed over respondent No.2/Bank. Even otherwise, once this Court holds in preceding paragraphs that both the parties stood ***In Pari Delicto***, then scope and rigours of Section 72 of the Contract Act pales into oblivion and insignificance in present set of facts. Respondent No.2 was not obliged to act in

accordance with Section 72 of the Act because ingredients of the said provisions are not available in the present case so as to compel respondent No.2 to return the amount so lost by the appellant/Bank.

35. In view of the above discussion, from perusal of the pleadings as well as evidence led by the parties, the trial Court has rightly passed the judgment and decree against the present respondent No.1 and exonerating respondent No.2 from any liability.

36. Thus, judgment and decree dated 28/08/2002 passed by V Additional District Judge, Gwalior in Civil Suit No.10-B/1998 is affirmed.

37. Resultantly, the appeal is hereby dismissed.

(Anand Pathak)
Judge

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