
(2015) 10 BOM CK 0164
In the Bombay High Court
Case No : Second Appeal No. 22 of 2015

Bank of Baroda

APPELLANT

Vs

HDFC Bank Ltd. and Others

RESPONDENT

Date of Decision : 29-10-2015

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 131, 131-A

Citation : (2016) 1 ABR 673 : (2016) 1 BomCR 298

Hon'ble Judges : C.V. Bhadang, J.

Bench : Single Bench

Advocate : Joesph Vaz, Advocate, for the Appellant; U.R. Timble, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

C.V. Bhadang, J.—By this appeal, the appellant/original plaintiff is challenging the judgment and order dated 10/6/2014 passed by the learned Ad hoc District Judge-I (FTC), Panaji in Regular Civil Appeal No. 85/2012. By the impugned judgment, the appeal filed by the respondents/original defendants has been allowed thereby dismissing Special Civil Suit No. 172/2003/B filed by the appellant.

2. The brief facts necessary for the disposal of the appeal may be stated thus:

"That the appellant is a banking corporation established under the Banking Companies (Acquisition and Transfer of Undertakings) Act 1970. The appellants are having branch offices at various places including one at Panaji-Goa. The respondent No. 1 is the head office of HDFC bank, while the second and the third respondents are branches of the HDFC bank at Mumbai and at Panaji-Goa."

3. A Demand Draft bearing No. PG 098111 for Rs. 900/- was purchased on 1.2.2003 in the name of one Shri Ashwin Babhubhai Trivedi. The said Demand Draft was purchased from Raipur branch of the appellant and was payable at its Kota branch in Rajasthan. As per the plaint allegations, the defendant No. 3 on

6/2/2003 presented the Demand Draft for clearing at the Panaji branch of the appellant, when it was found to be drawn on 4/2/2003 for a sum of Rs. 9,30,600/-. The appellants honoured the Demand Draft which was presented for payment in clearing by the respondent No. 3.

4. It further appears that some officials of the respondent No. 3 visited the appellant on 10/2/2003 asking for a copy of the Demand Draft on account of which the officials of the appellant became suspicious. Thereupon the Raipur branch of the appellant was contacted and upon inquiry it was learnt that the Demand Draft was actually issued on 1.2.2003 and was drawn on Bank of Baroda at Kota for a sum of Rs. 900/- (Rupees nine hundred only). Thus the appellants learnt that the Demand Draft which was sent for clearing by the respondent No. 3 was forged and materially altered draft. The appellants thereafter made attempts to seek details of the account holder, in whose account the Demand Draft was deposited and encashed. However, respondent No. 3 refused to divulge any information either about the account holder or about the encashment of the Demand Draft.

5. The appellants also reported the matter to the police on 10/2/2003.

6. On 13/2/2003, the Deputy Regional Manager of the appellant along with other officials visited respondent No. 3 and made a request to furnish information/details about (i) the name and address of the account holder (ii) date of opening of the account (iii) whether any FIR was lodged by the respondent No. 3. However, again no information was given or divulged. Subsequently it was learnt that there was no account in the name of Ashwin Babubhai Trivedi with the respondent No. 3, but there was such an account with the respondent No. 2 at Mumbai. It was also learnt that pursuant to the encashment of the Demand Draft the concerned account holder had withdrawn the amount from his account with the respondent No. 2. The appellants claim that Shri Ashwin Babubhai was either a fictitious person and/or the account was opened in a fictitious name. It was the material contention that the respondent No. 2 acted in a negligent manner while opening the account in the name of Ashwin Babubhai Trivedi and also permitting immediate withdrawal of the amount by the said account holder, when the withdrawal of a huge amount was permitted immediately upon encashment of the draft. It was contended that the respondent No. 2 has acted in total disregard of its duties and functions as a collecting banker and the respondent No. 3 is equally responsible for sending the forged/altered draft for collection, thus facilitating the collection of forged/altered draft.

7. It appears that the appellants issued a legal notice on 29/8/2003 to the respondent No. 3 claiming an amount of Rs. 9,30,600/- (Nine lakhs thirty thousand six hundred only) along with interest at the rate of 15% per annum w.e.f. 6/2/2003. However, the respondents failed to oblige. It was in these circumstances that the appellants filed Special Civil Suit No. 172/2003/B against the respondents for a sum of Rs. 10,53,363/- along with interest at the rate of 15% per annum from 6/2/2003 till date of payment.

8. The respondents contested the suit. All the adverse allegations were denied. It was contended that the relevant information regarding the account was given to the appellants in the first meeting itself. It was contended that in fact the appellants had acted without taking proper care and caution and without waiting for advice from its Raipur branch while making the payment of the draft. It was denied that there was any negligence or breach of any guidelines while opening the account or permitting withdrawal after the draft was encashed.

9. On the basis of the rival pleadings the learned Trial Court framed in all five issues as under:

"1. Whether the plaintiff proves that defendant No. 3 presented in the office of the plaintiff a forged demand draft bearing No. 098111 dated 4/2/2003 for sum of Rs. 9,30,600/- drawn by the Raipur branch of Bank of Baroda?

2. Whether the plaintiff proves that the said demand draft came to be honoured by the plaintiff due to total negligence and lack of care and caution on the part of defendant No. 2 and 3?

3. Whether the plaintiff proves that the defendants are jointly and severally liable to pay to the plaintiff the said amount of Rs. 9,30,600/- along with interest @ 15% per annum?

4. Whether the defendants prove that the account in question was validly opened with the usual banking norms and procedure prescribed for opening of a bank account?

5. What relief? What Order?"

10. At the trial, Guruprasad Rege, PW.1 was examined on behalf of the plaintiff and one Nello Teles was examined as DW.1 on behalf of the respondents.

11. The learned Trial Court answered the issues No. 1 and 2 in the affirmative while the issue No. 3 partly in the affirmative. The learned Trial Court answered the issue No. 4 in the negative and proceeded to decree the suit by its judgment and order dated 31/3/2012.

12. Feeling aggrieved the respondents filed appeal bearing No. 85/2012 before the learned Ad hoc District Judge-1 (FTC), Panaji. The First Appellate Court framed the following points for determination:

"1. Whether the plaintiff has proved that the demand draft dated 4/2/2003 for a sum of Rs. 9,30,600/- drawn by the Raipur Branch of Bank of Baroda and presented in the office of the plaintiff was a forged demand draft?

2. Whether the plaintiff suffered loss to the amount of Rs. 9,30,600/- due to the negligence and lack of care and caution on the part of the defendants?

3. Whether the defendants are jointly and severally liable to pay to the plaintiff the said amount of Rs. 9,30,600/- alongwith interest thereon as awarded by the trial Court?"

13. The first Appellate Court answered point No. 1 in the affirmative while points No. 2 and 3 in the negative. In that view of the matter, the appeal was allowed and the special civil suit, filed by the appellant was dismissed. Feeling aggrieved, the appellants are before this Court.

14. I have heard Mr. Vaz, the learned counsel for the appellant and Mr. Timble, the learned counsel for the respondents No. 1 to 3. With the assistance of the learned counsel for the parties, I have perused the record and the impugned judgments.

15. It is submitted by Mr. Vaz, the learned counsel for the appellants that as per the Know Your Customer (KYC) Guidelines framed by the Reserve Bank of India, it was obligatory on the part of the respondent No. 2 to obtain full and complete details of the account holder before the account was opened. The learned counsel would submit that admittedly in this case, the account was not opened on the basis of the account holder namely, Ashwin Babubhai Trivedi being introduced by another existing customer of the bank. It is submitted that the account was opened on the basis of the pan card which does not contain the residential or other address of the holder. The learned counsel has specifically referred to the Guidelines as circulated on 16/8/2002 and in particular the Guidelines No. 2.(i) and 2.2(i), which read as under:

"Know Your Customer" (KYC) procedure should be the key principle for identification of an individual/corporate opening an account. The customer identification should entail verification through an introductory reference from an existing account holder/a person known to the bank or on the basis of documents provided by the customer.

2.2 Customer identification:

(i) The objectives of the KYC framework should be two fold, (i) to ensure appropriate customer identification and (ii) to monitor transitions of a suspicious nature. Banks should obtain all information necessary to establish the identity/legal existence of each new customer, based preferably on disclosures by customers themselves. Typically easy means of establishing identity would be documents such as passport, driving license etc. However where such documents are not available, verification by existing account holders or introduction by a person known to the bank may suffice. It should be ensured that the procedure adopted does not lead to denial of access to the general public for banking services."

16. It is submitted that in the written statement the respondents had denied that KYC Guidelines are applicable to the bank, while DW.1 in his cross examination has admitted that KYC Guidelines are applicable to the said bank. It is further submitted that DW.1 has also admitted that no introduction of Ashwin Babubhai Trivedi was obtained from the existing customer of the bank.

17. It is submitted that, had the respondents supplied all the details, the

appellants would have pursued its remedy against the fraudster/Ashwin B. Trivedi and would not have gone after the respondents. During the course of the arguments reliance was also placed on the circular issued by the Indian Banks' Association, Deputy Chief Executive to all its member banks. It is submitted that the First Appellate Court was not justified in reversing the decree of the Trial Court.

18. On the contrary it submitted by Mr. Timble, the learned counsel for the respondents that the entire claim of the appellants is based on the alleged negligence by the respondents at the time of opening the account and thereafter while allowing immediate withdrawal of the amount after the encashment of the demand draft. It is submitted that the First Appellate Court after considering the various decisions and the concept of negligence has rightly found that the loss suffered by the appellants is not attributable to any negligence and lack of care and caution on the part of the respondents. The learned counsel would submit that a bare perusal of the demand draft would show that it was a forged and fabricated document. It is submitted that the officers of the appellants should have taken proper care and caution while allowing the encashment of the demand draft and cannot now turn around and stake their claim on the basis of the alleged negligence by the respondents. He submitted that the appeal does not involve any substantial question of law as set out.

19. I have given my anxious consideration to the rival circumstances and the submissions made.

20. In the appeal memo the appellant has set out the following substantial questions of law:

"(i) Whether the Appellate Court failed to appreciate the evidence on record that the respondents had not maintained the details of the account holder Mr. Ashwin B. Trivedi in terms of RBI Guidelines and as such the appellant is precluded from recovering the money due to negligence of the respondents and therefore the respondents are liable to pay the said amount defrauded along with interest to the appellant, the findings of the Appellate Court has resulted in miscarriage of justice?

(ii) Whether the respondents having grossly violated the RBI Guidelines and law in terms of the Negotiable Instrument Act are liable to pay to the appellant the said sum of Rs. 9,30,600/- along with interest of 6% as decreed by the Trial Court?"

21. At the outset it needs to be mentioned that a bare perusal of the Demand Draft would make it writ large that it was a fabricated or a tampered document. Not only the amount was tampered and changed from Rs. 900/- to Rs. 9,30,600/-, but the date was also changed from 1.2.2003 to 4/2/2003. The branch at which the Demand Draft was payable was also changed to Panaji Goa. Indisputably, the draft was issued by the Bank of Baroda branch at Raipur and was payable at Bank of Baroda Branch, Kota, (Rajasthan). Further it is

undisputed that the Demand Draft was deposited in the account of Mr. Trivedi with the respondent No. 2 at Mumbai and was sent for encashment to the appellant at Panaji through the respondent No. 3. In the first place, it is difficult to envisage as to how the draft, which on a bare perusal could be seen to be fabricated/tampered, could be encashed without waiting or calling for advice from the issuing branch of the appellant. The learned counsel for the appellant submitted that there were more than one thousand clearings, on that particular day and because of the pressure of work, the alteration made in the draft might have gone unnoticed. He also submitted that action was taken against some officer, departmentally for such negligence. That apart, we are presently concerned with the liability of the respondent for the amount as claimed. The whole basis of the claim made against the respondents is the alleged negligence at the time of the opening of the account and also while making immediate payment after encashment of the draft. There cannot be any dispute that KYC Guidelines which are binding on the banks are aimed at ensuring appropriate customer identification and to monitor transactions of a suspicious nature. This presupposes that the bank should obtain necessary information to establish identity of each new customers. Clause 2.1. KYC Policy envisages customer identification and verification through an introductory reference from an existing account holder/a person known to the bank OR on the basis of documents provided by the customer. Clause 2.2 (i) pertains to customer identification and provides that typically easy means of establishing identity would be documents such as passport, driving license etc. It further provides that where such documents are not available, verification by existing account holders or introduction by a person known to the bank may suffice. It should be ensured that the procedure adopted does not lead to denial of access to the general public while availing banking services. It can thus be seen that while ensuring that there is no denial of access to banking service, the banking authorities have also to balance the need for appropriate customer identification. The KYC guidelines do not set out any particular document which has to be insisted for establishing such identity. In the present case, according to the respondents, they had obtained a copy of the pan card. It is also pointed out that the account with the respondent No. 2 was opened by making initial deposit by virtue of a cheque drawn on another bank, namely, Bharat Co-operative Bank (Mumbai) Ltd., Bhandup Branch. It may further be mentioned that the respondent had shown willingness to and had supplied the copies of documents namely, (i) pan card No. ACTO737R (ii) Cheque dated 31/12/2002 drawn on Bharat Cooperative Bank and (iii) a copy of the account opening form to the learned counsel for the appellants without prejudice to his contentions. Be that as it may, the basic question is whether the claim of the appellant can be sustained on the basis of the alleged negligence by the respondents.

22. Negligence is basically a breach of duty to take care. The first Appellate Court has considered this aspect after referring to the decision of this Court in the case of Commissioners of Taxation v. English, Scottish & Australian Bank

[1920] A.C. 683 , which pertains to the question whether the bank is guilty of conversion in having been negligent in collecting the cheque on behalf of a customer which in fact did not belong to him. It was found that the negligence in such case with which the Court is concerned is not with reference to opening the account but in collecting the cheque. though the circumstances connected with the opening of an account may shed light on the question of collecting the cheque. The following observations in the case of Bapulal Premchand Vs. The Nath Bank, Ltd., may be reproduced with profit:

"primarily inquiry as to the negligence must be directed in order to find out whether there is negligence in collecting the cheque and not in opening the account" and that only if there is any antecedent or present circumstances which aroused the suspicion of the bank then it would be the duty of the bank before it collected the cheque to make the necessary inquiry and undoubtedly one of the antecedent circumstances would be the opening of the account. It was held by the Hon"ble Bombay High Court in the aforesaid case of "Bapulal Premchand" that in the said case there was no connection whatsoever between the opening of the account and the stealing of the cheque."

23. In Bapulal Premchand, (supra) it has been further held as under:

"In my opinion there is no absolute and unqualified obligation on a bank to make inquiries about the purported customer. I agree that modern banking practice requires that a customer should be properly introduced or in other words that the bank should act on the reference of someone whom it could trust. Therefore perhaps in most cases it would be wiser and more prudent for a bank not to accept his customer without some reference. But I am not prepared to go so far as to suggest that after a bank has been given a proper reference with regard to a proposed customer and although there are no suspicious circumstances attendant upon the opening of the account, it is still incumbent upon the bank to make further inquiries with regard to the customer."

24. The learned first Appellate Court has held and to my mind rightly so, that there were no suspicious circumstances attendant upon the opening of the account and therefore it was not incumbent upon the appellant bank to make further inquiries about his address. The Appellate Court has thereafter considered the provisions of Section 131 and 131-A of the Negotiable Instruments Act and the decision of the Hon"ble Supreme Court in the case of Indian Overseas Bank Vs. Industrial Chain Concern, , in which it has been held that even if there was negligence in opening of the account, that ipso facto would not result in loss to the true owner of the cheque collected and unless the plaintiff has also made a plea that there was "sufficient connection established between the opening of the account and the collection of the cheque", the defence under Section 131 could not be held to be barred. The first Appellate Court has further found that there was no evidence in this case to show that the opening of the account and the collection of the draft was forming part of the same transaction. The account with the respondent No. 2 was opened in

December 2002, while the Demand Draft was sent for collection in February 2003. Thus the account with the respondent No. 2 was not opened in close proximity to the encashment of the cheque so as to form part of the same transaction which may possibly lead to an inference of negligence by the respondents. The first Appellate Court has then considered the effect of Explanation II to Section 131 of the Negotiable Instruments Act which pertains to payment made by the bank on an electronic image in respect of CTS cheques. Here we are concerned with a draft which was sent to Panaji Branch of the appellant in a physical form and as such, the Explanation II of Section 131 was rightly held not to be attracted.

25. I have carefully gone through the judgment of the trial Court as also the First Appellate Court. I do not find that any exception can be taken to the finding of fact as recorded by the first Appellate Court about failure of the appellants in establishing that the opening of the account and the encashment of the demand draft formed part of the same transaction so as to establish any negligence on the basis of which liability can be fastened on the respondents. In the result, the appeal is hereby dismissed with no order as to costs.