
(1955) 08 BOM CK 0001
In the Bombay High Court
Case No : Appeal No. 128 of 1954

Bombay Mercantile Bank Ltd.

APPELLANT

Vs

Oriol Industries Ltd.

RESPONDENT

Date of Decision : 05-08-1955

Acts Referred:

Companies Act, 1956 — Section 89

Limitation Act, 1963 — Section 22

Negotiable Instruments Act, 1881 (NI) — Section 26, 27

Citation : AIR 1956 Bom 57 : (1955) 57 BOMLR 1039 : (1955) 25 CompCas 479 : (1955) ILR (Bom) 1072

Hon'ble Judges : Desai, J;Chala, J

Bench : Division Bench

Judgement

Chagla, C.J.—This appeal raises a very interesting question relating to the law of banking. The respondent company was incorporated on May 15, 1945, and Poddar Chacko & Co., were appointed as managing agents. On May 21, 1945, the company passed a resolution to open an account with the appellant bank and pursuant to that resolution an account was opened on May 28, 1945. Between May 28, 1945, and July 31, 1945, twenty-eight cheques were drawn on this account aggregating to Rs. 28,882-13-0. On August 28, 1946, the company passed a special resolution for winding up and appointed one Rao as liquidator. On September 28, 1948, the company by its liquidator filed the present suit from which this appeal arises and in the suit the company sought to recover from the bank the sum of Rs. 28,882-13-0 which had been paid on the cheques drawn upon it. On September 25, 1953, the plaint in the suit was amended as a result of the court holding that the special resolution for winding up was null and void. The amendment was to strike out the name of the liquidator and to make the suit as if it was instituted by the company itself. Mr. Justice TENDOLKAR passed a decree in favour of the company in respect of one cheque for Rs. 20,000 and non-suited the company in respect of the other cheques aggregating to Rs. 8,882-13-0. The bank has come in appeal against the judgment of Mr. Justice

TENDOLKAR in respect of the sum of Rs. 20,000 and the respondent company has filed cross-objections in respect of the sum of Rs. 8,882-13-0 in respect of which no relief was given by the learned Judge.

2. In limine Mr. Modi has contended that the suit filed by the company was barred by limitation, and the contention was that the suit should be deemed to have been instituted on September 25, 1953, when the plaint was amended. Mr. Modi says that when the suit was filed on September 28, 1948, the liquidator had no authority to file the suit, and if the suit was filed on September 25, 1953, it would be clearly barred because the cause of action would accrue to the company when it demanded the refund of the moneys paid by cheque on February 28, 1946, and that demand was refused by the bank. The question whether the suit is barred by limitation or not depends upon the provisions of section 22 of the Indian Limitation Act. That section provides :

"(1) Where, after institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party."

3. Therefore, if we take the view that a new plaintiff was substituted in the suit on September 25, 1953, then undoubtedly the suit would be barred. But we are inclined to take the view that the suit substantially was filed by the company first by its liquidator and then by amendment by itself. Therefore, this is not a case where a new plaintiff appears on the suit for the first time and limitation has run till he appears on the scene. It is unnecessary to elaborate this point because on the merits, as we shall presently point out, we are in favour of the appellants, so that the appellants are entitled to succeed apart from the plea of limitation which they have raised.

4. Turning first to the important documents in the case, we have in the first place the resolution passed by the company on May 21, 1945, and that resolution authorises the appellant bank to honour cheques, bills of exchange and promissory notes drawn, accepted or made on behalf of the company by the managing agents, Poddar Chacko & Co., by both the directors of the managing agents' firm, namely, Mr. Keshavdeo Poddar and Mr. M. J. Chacko, and to act on any instructions so given relating to the account whether the same be overdrawn or not, or relating to the transactions of the company. We have then the account opening form where the name of the account is stated to be the Oriol Industries Limited and the form bears the signatures of Mr. Chacko and Mr. Poddar. They have also signed the specimen signature slip and to this form is annexed a copy of the resolution to which reference has just been made. We have then the account opened in the appellant bank and the account is headed "The Oriol Industries Ltd." It is stated in the account that instructions are that the account will be operated by Poddar and Chacko jointly. We have also the entry in the appellant's book relating to the issue of cheques which shows that one cheque book was issued bearing cheques Nos. 4276 to 4300 on May 28, 1945, and another cheque book bearing cheques Nos. 4501 to 4524 bearing the date June

18, 1945. It is not in dispute that the cheques in suit, 28 in number, were all drawn from these two cheque books. The contention of the respondent company was that the name of the company did not appear on any of the cheques and the cheques were not drawn by or on behalf of the company. It was solely on this ground that the respondent company contended that the cheques were improperly honoured by the bank and the bank was liable to refund the amount of the cheques. A plea of negligence against the bank was made in the plaint, an issue was raised at the trial, but that issue was expressly given up by the respondent company, and it is pertinent to note that in the plaint there is no averment at all of any mala fides against the bank. It is on these facts and these documents that the interesting question arises as to whether a bank which honours a cheque pursuant to the instructions issued by a corporation is liable to refund the amount of the cheque if the cheque on the face of it does not purport to have been drawn by the company or on behalf of the company or on account of the company. The respondent company is right when it urges that when you look at the cheque of Rs. 20,000 in respect of which the appellant has preferred this appeal - and that is also true of the other cheques - there is no indication that the cheque was drawn by the respondent company. It is signed by Poddar and Chacko, but the signatories do not state that they are drawing or signing this cheque on account of or on behalf of the respondent company. It is by reason of the form in which the cheque is drawn that the respondent company puts forward the contention that the company cannot be bound by any negotiable instrument which on the face of it does not make it clear that it was drawn by or on account of the company itself. The learned judge accepted this contention of the respondent company, but he took the view that there was an equitable principle which, in the case of cheques aggregating to Rs. 8,882-13-0, came to the relief of the bank, and the equitable principle was that if it is established that the cheques honoured by the bank although the cheques were not in proper form were in fact utilized for the purpose discharging the liabilities of the company, then equity would prevent the company from recovering the amount from the bank. The learned Judge held that to the extent of Rs. 8,882-13-0 the bank had established that this amount had in fact been utilized to discharge the liabilities of the company, and with regard to Rs. 20,000 the learned Judge held that the bank had failed to prove that this amount had also been utilized to discharge the liability of the company. Therefore, as pointed out, the learned Judge passed a decree in favour of the company with regard to this sum of Rs. 20,000.

5. Turning to the law on the subject, as we are dealing with a negotiable instrument we must first turn to the Negotiable Instruments Act, and section 26 of the Act provides :

"Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, endorsement, delivery and negotiation of a promissory note, bill of exchange or cheque."

6. It is then provided :

"Nothing herein contained shall be deemed to empower a corporation to make, endorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered."

7. This provision does not in any way enact any substantive or procedural law with regard to the power of a corporation to make, endorse or accept negotiable instruments. The only effect of this provision is that what is provided in the first paragraph of section 26 should not be construed so as to extend the authority of a company to make negotiable instruments. But the law regarding the power of a company to make negotiable instruments is to be found in the Companies Act itself and not in the Negotiable Instruments Act. Therefore section 26 really throws no light on what the powers of a company are or what limitations there are upon that power to make, endorse or accept a negotiable instrument, and therefore we must turn to the Companies Act in order to determine what the law is with regard to a company's power to make a negotiable instrument, and that provision is to be found in section 89 of the Companies Act :

"A bill of exchange, hundi or promissory note shall be deemed to have been made, drawn, accepted or endorsed on behalf of a company if made, drawn, accepted or endorsed in the name of, or by or on behalf or on account, the company by any person acting under its authority, express or implied."

8. Therefore, before a company can be bound by a negotiable instrument, two conditions have to be satisfied. The negotiable instrument must be made, drawn, accepted or endorsed in the name of, or by or on behalf or on account of, the company, and the person who makes, draws, accepts or endorses the negotiable instrument must act under an authority given by the company, although that authority may be express or implied. But the first condition makes it clear that the negotiable instrument on the face of it must show that the negotiable instrument has been made, drawn, accepted or endorsed by the company. You may have the name of the company itself on the negotiable instrument or the person making it may state that he has done so on behalf or on account of the company. But the tenor of the negotiable instrument must be such that there can be doubt that it is a negotiable instrument drawn by a company. The same principle is embodied in a sense in section 27 of the Negotiable Instruments Act which provides :

"Every person capable of binding himself or of being bound, as mentioned in section 26, may so bind himself or be bound by a duly authorized agent acting in his name."

9. When an agent acts on behalf of his principal in respect of a negotiable instrument, he must make it clear that he is acting as an agent and not as the principal. The Privy Council had occasion to consider this section in *Sadasuk Janki Das v. Sir Kishan Parshad* I.L.R. ([1918] 46 Cal. 663; 21 Bom. L.R. 605, and they have pointed out that the name of a person or firm to be charged upon a

negotiable instrument should be clearly stated on the face or on the back of the document so that the responsibility is made plain and can be instantly recognised as the document passes from hand to hand. The fundamental principle underlying the law of negotiable instruments is that as a negotiable instrument passes from hand to hand, persons dealing with it should have no doubt as to who is liable upon the negotiable instrument, and although, as we pointed out, the same principle is enunciated in section 27 of the Negotiable Instruments Act, section 89 of the Companies Act emphasises that principle and makes it clear that a company will not be bound in its corporate capacity in respect of a negotiable instrument unless that negotiable instrument on the face of it and according to its tenor makes it clear that it is a negotiable instrument made, drawn or endorsed by the company itself.

10. Now, the principle underlying section 89 of the Companies Act is so salutary that we would be very loath to suggest any exception to that principle. But what must be borne in mind in considering section 89 is that it deals with the liability of a company in respect of a negotiable instrument and the law refuses to impose liability on a company in respect of a negotiable instrument unless the negotiable instrument bears the name of the company itself. It is this principle which was sought to be relied upon by the respondent company in respect of the cheques in the suit. It was pointed out that the cheques did not indicate that they emanated from the company and therefore the company could not be made liable in respect of these cheques. But what was overlooked - and that is the whole point of the distinction that we are going to make in this case between the principle which we have just enunciated and the position that arises in appeal before us - was that in the suit filed by the company no question arose of the company being liable on these cheques. Far from any such question arising, the company in the suit sought to recover from the bank moneys which had already been paid by the bank on the cheques drawn upon the bank, and as we shall presently point out, a sharp distinction must be drawn between a case where a company is sought to be held liable on a negotiable instrument and a case where a company is seeking to recover moneys already paid by a bank on cheques drawn upon the bank.

11. Once again, we must clearly understand the nature of the suit. It is a suit between a constituent and his bank and the constituent is seeking to recover from the bank moneys wrongly paid as a result of certain cheques drawn upon the bank. The correct principle that would apply to a case like this has been clearly enunciated by the House of Lords in a very old case but which, as we shall point out, is still good law. The House of Lords case is *Mahony v. East Holyford Mining Co.*[1875] L.R. 7 H.L. 869 and the facts of that case are rather striking. Cheques were drawn by the directors of a company upon a bank and the cheques were honoured, and it was found that the directors had never been properly elected and that they had no authority to represent the company, and when the company went into liquidation the official liquidator filed a suit to recover from the bankers the amount of the cheques. The House of Lords held

that where those who draw and those who (bona fide) honour cheques, intend them to operate on a certain account, no objection can afterwards be taken that that account is not specifically mentioned on the face of the cheques, and LORD CHELMSFORD in his speech precisely and succinctly states the law as follows (p. 893) :

"With respect to the objection that the name of the company is not on eight of the cheques paid by the bank, and therefore by the Companies Act, 1862, they are invalid, and the official liquidator is entitled, at all events, to the amount of these cheques, the short answer is, that although the bankers might perhaps have required that these cheques should be made formally correct before they were paid, yet having paid them upon the demand of the only persons whom they knew as representing the company in the operations upon the account, there is not the slightest pretence for insisting upon the liability of the bank to repay the amount of these cheques on the ground of an unauthorized payment of them."

12. Therefore, what is necessary in order to protect the bank is first and foremost that the bank must act bona fide and the person drawing the cheque and the person honouring the cheque must intended that the cheque was to operate on a certain account, and if these conditions are satisfied, then the bank is protected and the bank cannot be held liable merely because the cheques did not comply with any particular formality.

13. Now, when we look at the facts of this case, the conditions laid down in the judgment of the house of Lords are amply complied with. As we have pointed out, there is no dispute here that the bank acted bona fide. With regard to the intention of the drawer and the drawee to operate on a specific amount, the most significant piece of evidence is that the cheque books were issued to the respondent company and it was on the cheques issued to the respondent company that Poddar and Chacko put their signatures and with the help of their signatures obtained money from the bank. The persons who drew the cheques were authorised to draw them pursuant to the resolution which had been sent to the bank, and therefore in this case as in the case of the House of Lords the only irregularity was in the form of the cheque because the cheque did not state that it was drawn by the company or on behalf of the company or on account of the company. If that formality had been complied with, the respondent company would have no case at all. The question is whether in the absence of that formality the respondent company can successfully maintain this action. If we come to the conclusion, as indeed we do, that the bank bona fide honoured these cheques intending that these cheques were to operate upon the account of the respondent company and honestly satisfied that the persons drawing the cheque were duly authorized by the company to draw the cheques, then in our opinion the respondent company cannot claim to recover the amount of the cheques from the bank. We must once more emphasise the fact that this is not a case of absence of authority on the part of the two gentlemen who drew the cheques.

Want of authority is not pleaded in the plaint. All that is pleaded is that by reason of section 89 of the Companies Act the cheques which are negotiable instruments were not drawn by the company or on behalf of the company or on account of the company, and therefore the company was not bound by the cheques.

14. The learned Judge below considered this decision of the House of Lords, but he took the view that this decision was given under the common law and not under the Negotiable Instruments Act which had not been enacted in England in 1875 when this decision was given. With very great respect to the learned Judge, in the passage which we have quoted from LORD CHELMSFORD'S speech, it is clear that he has referred to the Companies Act of 1862 and that was the substantive law which contained provisions with regard to the liability of a company on a negotiable instrument, and we have satisfied ourselves that section 47 of the English Companies Act of 1862 is identical in terms with our section 89 of the Companies Act. Therefore the House of Lords decision was given on a consideration of the provision in the Companies Act which makes a company liable on a negotiable instrument, and notwithstanding that provision the House of Lords came to the conclusion that under certain circumstances the bank would not be liable to refund the amount of the cheque drawn upon the account of the company even though the cheque did not purport to be in the name of the company. What is more, two important text book writers have expressed their opinion that the statement of the law enunciated by the House of Lords is still good law in England. Chalmers on Bills of Exchange, 12th edn., at page 63 says :

"So, too, bankers may be justified in paying cheques out of the funds of a company where clearly, by the form of the cheques, the company would not be liable as drawers if they should not be paid."

15. Chalmers brings out the distinction between the two classes of cases very clearly and emphatically. If the cheque was not in proper form, the company would not be liable on that cheque, but under certain circumstances a banker may be justified in paying that cheque out of the funds of the company. Again, Halsbury in Halsbury's Laws of England, 3rd edn., Vol. VI, at p. 429, states the law as follows :

"Although documents omitting the name of the company therefore cannot be relied on as against the company, moneys paid under them to persons known to represent the company are not on that account payable over again."

16. Both Chalmers and Halsbury rely on the decision of the House of Lords in *Mahony v. East Holyford Mining Co.* [1875] L.R. 7 H.L. 869 as authority for these two respective propositions of law. Our section 89 of the Companies Act is wholly based upon the English Companies Act, and if the House of Lords had construed section 89 so as not to impose a liability upon an honest banker paying a cheque out of the funds of the company, although the cheque was not in proper form, we see no reason why we should not accept the interpretation of section 89 placed

upon it by so high an authority as the House of Lords.

17. The learned Judge also relied on a judgment of a Division Bench of this court in *In re The New Flemming Spinning & Weaving Company Ltd.* (in liquidation). I.L.R. [1879] 4 Bom. 275. In that case, again, the question that arose was whether the company was liable on a bill drawn by the treasurer and agent but which bill did not clearly indicate that the bill was drawn by the company, and SIR CHARLES SARGENT, Chief Justice, and Mr. Justice BAYLEY held that the company was not liable. Again, with very great respect to the learned Judge, he has overlooked the clear distinction that this particular case was dealing with the liability of the company in respect of a negotiable instrument, and the case that we have to consider is not a case where the liability of the company is being determined on a negotiable instrument. If that was the case before us, no further argument would have been necessary, and the clear decisions both here and in England are that no liability could be imposed upon a company on a negotiable instrument where the negotiable instrument was not made clearly by the company itself.

18. It was are right in the view that we take, then no question of the application of the equitable principle can arise. Both with regard to the cheque for Rs. 20,000 in respect of which the bank is held liable and also in respect of the other 27 cheques aggregating to Rs. 8,882-13-0 irrespective of any equitable principle the bank is not liable to refund the amount because it bona fide paid the cheques from the account of the respondent company.

19. The result, therefore, is that the appeal preferred by the bank must succeed and the cross objections filed by the respondents must fail. The appeal will, therefore, be allowed with costs. Cross objections dismissed with costs. The suit will be dismissed with costs.

20. Liberty to the appellants' attorneys to withdraw the sum Rs. 500 deposited in court. Undertaking given by the solicitors discharged.

21. Appeal allowed.