(1996) 06 NCDRC CK 0042

In the National Consumer Disputes Redressal Commission

HOUSE OF DUBARY — APPELLANT

Vs

PUNJAB NATIONAL BANK — RESPONDENT

Date of Decision : 21-06-1996

Acts Referred:

Citation : 1996 0 NCDRC 67 : 1996 2 CPJ 223 : 1996 2 CPR 259 : 1997 1 CLT 21

Hon'ble Judges : V.BALAKRISHNA ERADI , B.S.YADAV , S.S.CHADHA , R.THAMARAJAKSHI , S.P.BAGLA J.

Advocate : GAURI SHANKAR , RAJAPPA , , Y.P.CHANDNA

Judgement

1. THIS Original Petition by the House of Dubary against the Punjab National Bank (erstwhile New Bank of India) is a one page petition but contains all relevant facts and pleas filed by Professor Shatrughan Darbari, Managing Partner of the complainant alleging deficiency in service of the opposite party in not giving the due interest to the complainant from 1979 to 1986 on a sum of Rs. 37.50 lakhs as received from Yugoslavian buyers as payments for the third consignment of electronic items to House of Dubary and illegally kept by the opposite party in its Sundry Accounts.

2. THE relevant facts as culled out from the pleadings and the complainant''s affidavit which also contain extraneous matters are these. House of Dubary, a partnership firm, had opened a Current Account No. 123 with New Bank of India at Defence Colony Branch, New Delhi besides other accounts and Fixed Deposit Receipts. The complainant was engaged in the business of export of consumer goods to various countries. The complainant had entered into an export deal with M/s. SOLUN 91480 GEVGELIJA, Yugoslavia and the documents pertaining to that deal were negotiated through the opposite party. The payments were given to the opposite party by the said Yugoslavian buyer through their Bankers STOPAISKA BANKA SKOTPE, Yugoslavia, through manufacturer Hanover Trust Co, International Division 4, New York Plaza, U.S.A. for credit to the complainant. The payment by the Yugoslavian buyer was against a Letter of Credit. According to the complainant, they received on or about 6.9.79 through opposite party a

payment of US dollars 4,24,504.89 equivalent to Indian Rs. 33,82,507.08 from the Yugoslavian buyers against the Letter of Credit and similarly another payment US dollars 50,000 equivalent to Indian Rs. 3,84,911.47 was received on 7.6.80, but the opposite party failed and neglected to credit these amounts in the accounts, already opened and in operation or to convert into the Fixed Deposit Receipts bearing interest, but the same was credited in a Sundry Account by the opposite party illegally without any authority and instruction from the complainant. The case is that the sum of Rs. 37,67,470.55 was neither credited to the account of the complainant nor converted into Fixed Deposit Receipts despite instructions by the complainant to the opposite party and no interest on the said amount has been credited or given. This amount was4cept by the opposite party is Sundry Account allegedly in pursuance of a restraint order from a Civil Court. Ultimately as per the orders of High Court of Gujarat dated 28.4.86 in First Appeal No. 531/86 the amount was directed to be invested in the State Bank of India main branch in the name of the Additional Registrar, Gujarat High Court. The opposite party was directed to transfer the aforesaid amount in the State Bank of India but clarified that the opposite party would not permit the complainant to withdraw any amount out of the said amount from the New Bank of India, Defence Colony branch, New Delhi. The version of the opposite party in the nutshell is that the erstwhile New Bank of India was restrained by the order of Civil Court from making any payment or transferring the amount of Rs. 37.50 lakhs received from the foreign buyers since there was a dispute between the complainant and the supplier, and that there being a dispute between the parties and by virtue of the restraint order passed by the Civil Judge, Bhuj Court by the order dated 7th May, 1979 the disputed sum of Rs. 37.50 lakhs was kept in the Sundry Account from May 1979 to April 1986 and during this period no instructions from any Competent Court and/or from the complainant were received by the erstwhile New Bank of India to keep the said amount of Rs. 37.50 lakhs in F.D.R. Account. It is pleaded that there is no deficiency in service on the part of the opposite party and that under the orders of the Court the New Bank of India was directed to transfer the amount of Rs. 37.50 lakhs to the State Bank of India and until then there was no direction from any Civil Court or the High Court nor were there any specific instructions to keep the amount of Rs. 37.50 lakhs in the RD.R. Account. It is pleaded that the said disputed amount remained lying in the Sundry Account as per orders of the Civil Court on which no interest was paid. The opposite party has also raised some preliminary objections. It is pleaded that the complaint has been filed claiming the interest for the period from 1979 to April 1986 in respect of the amount of Rs. 37.50 lakhs lying in the Sundry Account with the erstwhile New Bank of India which is barred by limitation and no relief can be granted to the complainant. The second preliminary objection is that the complainant had earlier filed a complaint bearing Original Petition No. 29/89 against the New Bank of India wherein the complainant had claimed various reliefs and the relief of rendition of accounts on the allegation that the complainant had a number of accounts with the Bank by way of current A/c, overdraft accounts, etc. and this Commission after going through the contents of the complaint came to the conclusion that the prayer for ordering rendition of account does not come within the scope and provision of Consumer Protection Act, 1986 as such the complaint was dismissed. The plea is that the complainant omitted to claim the relief of interest in the previously instituted complaint bearing Original Petition No. 29/89 and therefore the present complaint is barred by the provisions of the Order II, Rule 2 of C.P.C. The parties filed their respective affidavits and documents in support of their respective versions.

3. THE case came up for hearing before this Commission on 7th March, 1995. The opposite party''s defence was based on the restraint order passed by the Civil Judge, Bhuj Court by the order dated 9th May, 1979. That Order was not on the record of the case. A copy of the Order dated 21st May, 1979 of the Civil Judge, Bhuj Court was brought to our notice restraining the opposite party from transferring Rs. 62,91,245.18 realised from Yogoslavian buyers of suit goods in the account of Defendant Nos. 1 to 4 till 19.6.79 and extended up to 11.7.79 but the subsequent orders of the Court were not on the record. The hearing of the case was adjourned and in the meanwhile Counsel for the complainant undertook to produce in the form of a paper book all relevant documents which would throw light on the question whether there was a Court order prohibiting the Bank from making payment of the amounts to the complainant which was operative beyond 11th of July, 1979. The complainant was called upon to produce as part of the said paper book copies of all the relevant correspondence that passed between the complainant and the Bank in relation to the retention of the said amount by the Bank and the manner in which the said amount should have been retained in the Bank in view of the Court orders. A set of copies of the Courts orders and documents have been filed by the complainant. The documents were, however, scattered with the affidavits, with the written arguments or with the compilation of its own. When the matter came up for hearing on 29th November, 1995 we directed the Counsel for the complainant to file a self contained compilation of relevant documents / orders but only selected documents were filed. We had considerable difficulty in weeding through the records to find out the relevant documents.

4. BEFORE going into the merits we may dispose of the preliminary objections. The question of limitation raised by the opposite party has to be looked into in the light of relationship of a Banker and customer. The complainant submits that the opposite party violated fiduciary obligation of the Banker toward his client and has gone against the very norm of banking regulations in keeping the amount in Sundry Account and thus the complainant is entitled to receive both interest and damages for the negligence and deficiency in service. The Supreme Court in UCO Bank v. Hem Chander Sarkar, 1990(3) S.C.C. 389, has ruled that "we may also state that in practice bankers do not set up the statute of limitation against their customers or their legal representatives, and we see no reason why this case should be an exception to that practice". In our view, it does not behove Bankers to raise the plea of limitation when the only relief claimed is for

payment of interest for the period the money of the constituent was with the opposite party. There is also no merit in the objection of the opposite party regarding the bar of Order II Rules 2 of the Code of Civil Procedure. The copy of the Original Petition No. 29/ 89 is on record as also the written statement filed by erstwhile New Bank of India. The relief claimed was for a direction to the opposite party to render true and correct accounts and after the rendition of accounts, the opposite party was to pay the amounts due to the complainant beside loss of business, goodwill, profit, mental torture etc. Another relief claimed was to direct the opposite party as to why the amount of Rs. 37.67 lakhs was put into a Sundry Account and as to why the complainant was not given any interest on the said amount. This Commission in the Order dated 22nd September, 1989 opined that the relief sought for in that complaint was the rendition of account and recovery from the respondent-Bank of the amount that might be ultimately found due on accounts being taken. The grant of relief of rendition of account in relation to transactions with the Bank is not within the scope of the provisions of the Consumer Protection Act and the averments in the petition did not make out any deficiency in service rendered by the Bank. The Original Petition was dismissed leaving the complainant to have a recourse to a suit in the Civil Court or other proceedings. The complainant did not in the earlier complaint claim any interest on the amount of Rs. 37.67 lakhs. The only prayer for direction to the Bank was as to why the complainant was not given any interest on the said amount. The subject-matter of deficiency in service of the non-payment of interest was not taken in the earlier complaint, though open. But the technical rules of procedure contained in the Code of Civil Procedure are not applicable to the proceedings before the Consumer Fora. The bar of Order II Rule 2 of C.P.C. is not attracted to the proceedings before this Commission. That takes us to the consideration of the orders passed by the Civil Court relied upon by the opposite party in compliance of which the amount was kept in the Sundry Account or as a justification for that action for which we had to sift the material on record. One Hanspa Knit (P) Ltd. filed Civil Suit No. 120 of 1979 in the Court of Civil Judge at Bhuj against the complainant and is partners (Defendants Nos. 1 to 4 in that suit) and M/s. Air Freight (P) Ltd. (Defendant No. 5) and New Bank of India (Defendant No. 6). As already noticed the order dated 9th May, 1979 relied upon by the opposite party in its written version is not on the record. The first order of the Civil Judge, Bhuj in the said suit is order dated 21.5.79 reading as follows: "Defendant No. 6 is restrained from transferring Rs. 62,91,245.18 Ps. realised from Yugoslavian buyers of suit goods in the account of defendant Nos. 1 to4tilll9.6.79." Another order of the Civil Judge, Bhuj is dated 26.6.79. It is apposite to reproduce the whole of the order:

"Heard arguments. Defendant No. 6 has already restrained by this Court to make payment of goods sold to Yugoslavian buyers to defendant Nos. 1 to 4. The plaintiff is feared that defendant Nos. 1 to 4 might have received the said amount from Yugoslavian buyers in respect of the third consignment when the same is not received by defendant No. 6 uptil now, through any other Bank or

Bankers. Looking to the pleadings of the parties when the application for preliminary injunction is heard today and till the final order is passed it is in the interest of the justice to pass a conditional order at this stage restraining defendant Nos. 1 to 4 to receive the amount of the third consignment from Yugoslavian buyers or their bankers in any manner for the period of 15 (fifteen) days. Hence the following order is passed:

Defendant No. 1 to 4 are restrained from receiving any amount of the third consignment through any other bankers or any other manner from Yugoslavian buyers or their bankers till 15 (fifteen) days and without previous order from Court. Notice to the other side on payment of urgent. Pronounced today in open Court. 26.6.79 at Bhuj Sd/- N.L. Solanki, (N.L. Solanki) Civil Judge, Bhuj-Kachchh

5. THE final orders were passed by the Civil Judge, Bhuj on May, 29, 1980 reading as follows: "The plaintiff has filed this application in order to restrain the defendant No. 6 from making any further withdrawals to defendant No. 1 to 4. The defendant Nos. 1 to 4 have filed their reply at Ex. 153 and the defendant No. 6 has filed his reply at Ex. 154 respectively. In view of the order passed below Exs. 8 and 42, the defendant No. 6 is required to be restrained from permitting further withdrawals to defendant Nos. 1 to 4 in their account of the security of the FDRs in respect of the money received from the Yugoslavian buyers in connection with the second and third consignment. The 6th defendant can allow the defendant Nos. 1 to 4 for withdrawals in their accounts on the security of the FDRs. Hence the defendant No. 6 is hereby restrained from permitting any further withdrawals to defendant Nos. 1 to 4 in their accounts on the security of FDRs in respect of money received from the Yugoslavian buyers regarding the consignment Nos. 2 and 3.

Pronounced in the open Court on May 29, 1980". Second part of the order is as follows: "The ad interim injunction which is passed below Exs. 8 and 42 against the defendant Nos. 6 and 1, 2, 3 and 4 respectively is made absolute. The notice which is issued against the plaintiff below Ex. 110 is hereby ordered to be vacated. Costs to be the cause in the suit. Pronounced in the open Court on May 29, 1980."

6. IT bears repetition that the orders that were passed on 26.6.79 below Ex. 42 were made absolute on 29.5.80. The orders are only to the effect that the complainants were restrained from receiving any amount of the third consignment through any banker including the opposite party or any other manner form Yugoslavian buyer or their Bankers. We may recall that the complainant had entered into the export deal with the Yugoslavian buyer and documents pertaining to that deal were negotiated through the opposite party and the payments were sent to the opposite party by the Yugoslavian buyer against Letter of Credit. The amounts were received by the opposite party for payment or for credit to the complainant. According to the opposite party''s letter dated 30.12.80 the opposite party received Rs. 33,82,509.08 on 6.9.79 and Rs. 3,84,911.47 on 21.6.80 respectively from Yugoslavian buyers/Bank. The opposite

party in its letter dated 6.9.79 informed the complainant that they received U.S. dollars 4245004.89 being part payment against captioned bill and the entire amount equivalent to Indian Rs. 33,82,509.08 had been kept in Sundry Account due to litigation in the complainant''s account and this was for the information of the complainant. The complainant vide his letter dated 10.9.79, inter alia, requested the opposite party to credit their current overdraft account for Rs. 30 lakhs as received by the opposite party as interest was being charged on their account. Subsequently the complainant wrote letter dated 17.9.79 to the opposite party reading as follows: "We wish to inform you that regarding our payment of US $ 424,504.89 which you have received, we advise you not to put this in Sundry Accounts as we are losing interest unnecessarily. You are requested to please put this amount in fixed deposit from the date of receipt of money and give us interest from the same date, failing which you will be held responsible. Thanking you."

This letter must have been delivered personally as the photo copy of the letter bears the seal of the New Bank of India and signatures of some officials dated 20.9.79. There are other letters on the record but they are not relevant to the issue in this Original Petition.

7. IT is not in dispute that the complainant had hired services of the opposite party for consideration. The opposite party had agreed to collect the proceeds from the Yugoslavian buyer and the documents were negotiated through the opposite party. The opposite party has realised the charges for collecting the said amount by debiting it to the account of the complainant. The complainant is the creditor in respect of the amount received from the Yugoslavian buyer. It makes no difference in law whether the amounts shown in the account were deposited by the complainant or on his behalf by the Yugoslavian buyer in pursuance of the Letter of Credit. The law in this regard is settled by the Supreme Court that it may be presumed; in the absence of evidence to the contrary that the money paid is to be held as Bankers ordinarily hold the money of their constituents. Even if the money is held in a suspense account, the Bank is not a trustee for the amount, but a debtor (see the New Bank of India Ltd. v. Pearey Lal, AIR 1962 Supreme Court 1003). In Shanti Prasad Jain v. The Director of Enforcement, AIR 1962 Supreme Court 1764 the Supreme Court viewed: "Now the law is well settled that when moneys is deposited in a Bank, the relationship, that is constituted between the Banker and the customer, is one of debtor arid creditor and not trustee and beneficiary. The Banker is entitled to use the moneys without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. And it makes no difference in the jural relationship whether the deposits were made by the customer himself, or by some other persons, provided the customer accepts them. There might be special arrangement under which a Banker might be constituted a trustee but apart from such an arrangement, his position qua Banker is that of a debtor, and not trustee. The law was stated in those terms in the old and well-known decision of the House of

Lords in Foley v. Hill, (1848) 2 HLC 28:9 FR1002, and that has never been questioned."

8. ORDINARILY , it was Banker''s obligation to credit the amount received, as the documents were negotiated through it, in the name of the account holder or deal with it as per the instructions given by the complainant in the letter dated 17.9.79 to convert the amount into Fixed Deposit Receipts. The orders of the Court extracted above is only a restraint order against the complainant "from receiving any amount of third consignment". The opposite party had therefore to deal with the money received as a prudent Banker and invest it in the FDRs earning interest. There was no direction of the Court to put the amount in a Sundry Account. It has not been brought to our notice as to whether there are any instructions or guidelines of the Reserve Bank of India that when certain deposits are under cloud by virtue of disputes/Court orders the amounts are required to be kept in Sundry Account. The complainants were restrained from only receiving the amount of the consignments but the Bank was not restrained from dealing with the money on the mandate of the complainant. The Bank, if it had any doubt, could seek clarification from the Court and not blame the complainant in not seeking an order from the Court to put the money into FDRs earning interests. The complainant was a creditor and the Bank a debtor in respect of the said amount and the complainant had given specific instructions to the opposite party to put the money in FDRs and not Sundry Account. The opposite party acted negligently in obeying those instructions, particularly in the absence of any specific instructions of the Court. By putting the said amount into FDRs earning interest, the opposite party was not permitting the complainant to withdraw the amount in violation of the Court orders. The opposite party as a prudent banker with expertise was expected to keep the said amount bearing returns specifically because of the mandate of the complainant and the failure to de so is deficiency in service. The complainant is entitled to interest which he would have normally earned on the amount kept in the Fixed Deposit Receipts as a long term deposit which interest at that time was around 12% per annum. The complaint is allowed. The complainant is granted interest on the amounts of Rs. 33,82,509.08 from 6.9.79 till 28.4.86 and on Rs. 3,84,911.47 from 21.6.80 to 28.4.86 at the rate of 12% per annum amounting to a round figure of Rs. 29,67,000/- (Rupees twenty nine lakhs and sixty seven thousand only) The amount of interest shall be paid within three months from the date of receipt of this order failing which it will carry interest at the rate of 18% from the date of this order till realisation. The complainant is also awarded costs against the opposite party assessed at Rs. 5,000/-.