
(1971) 04 MAD CK 0043
In the Madras High Court

Kanyalal Thakurdas, Bankers

APPELLANT

Vs

The Bombay Cycle Importing Company, Cycle dealers

RESPONDENT

Date of Decision : 05-04-1971

Acts Referred:

Evidence Act, 1872 — Section 115

Negotiable Instruments Act, 1881 (NI) — Section 131

Citation : (1972) ILR (Mad) 210 : (1972) 85 LW 60 : (1972) 1 MLJ 412

Hon'ble Judges : R. Sadasivam, J

Bench : Division Bench

Judgement

R. Sadasivam, J.—The Bombay Cycle Importing Company, the respondent in these appeals and Civil Revision Petitions, filed O.Ss. Nos. 2765 and 2838 of 1959 and S Cs. Nos. 7 of 1960 and 17 of 1961, on the file of the City Civil Court, Madras, to recover Rs. 3,249-11-0, Rs. 3,890-14-0, Rs. 559-50 and Rs. 559-63 respectively with subsequent interest and costs, against the four defendants in all the suits under the following circumstances.

2. The first defendant, P.V.A. Chari in each of the suits was employed in the plaintiff-company as a steno-typist on a salary of Rs. no a month and he Was in such employment from December, to July, 1956 and from September, to April, 1957. His duties were to attend the tapals and pass on the drafts and cheques to the Manager of the company. The evidence of P.W. 1 Ratilal J. Shah, who is the manager of the plaintiff's firm for the last 20 years, is that in respect of the drafts and cheques Exhibits A-6, A-14, A-17 and A-20 forming the subject-matter of O.S. No. 2838 of 1959, Exhibits A-22, A-24, A-26 and A-28 forming the subject-matter in O.S. No. 2765 of 1959, Exhibits A-31 and A-32 forming the subject-matter of S.G. No.7 of i960 and Exhibits A-33 forming the subject-matter of S.G. No. 17 of 1961, the first defendant P.V.A. Chari did not hand over the cheques and drafts to him. According to him, the first defendant had access to his rubber stamp seal during his absence at lunch interval. The second defendant in these cases is the Nilgiri Potato Supply Company. The plaintiff-company deals only in cycles and it had no dealings with the Nilgiri Potato Supply Company who

deal only in potatoes. The above drafts and cheques contained endorsements purporting to have been signed by the Manager of the plaintiff-company, as though they were transferred in favour of the second defendant-company. Admittedly, the second defendant-company as customers of the third defendant in each of the suits collected the amounts of the cheques and drafts by paying commission to the third defendant. The plea of defendants 1 and 2 is that these cheques and drafts were given by the plaintiff-company to the second defendant-company by way of accommodation. The first defendant filed a written statement in the original suits, but he remained ex parte. In fact, it is admitted before us that the first defendant has been convicted for the offences committed by him with regard to the cheques and drafts. The evidence of the second defendant as D.W. 1 in this case that he got the cheques and drafts by way of accommodation from the plaintiff-company has been disbelieved by the learned Seventh Assistant Judge, City Civil Court, Madras, for the very good reasons given by him. There was no correspondence between the second defendant and the plaintiff and they have not seen each other. Even the account books maintained by the second defendant-company do not show that they had dealings with the plaintiff-company. It is also unnatural that the plaintiff-company would endorse their cheques and drafts in favour of the second defendant-company directly, instead of giving their own drafts and cheques, if they wanted to give accommodation to the second defendant-company. Further, D.W. 1 started giving evidence by saying that he is the second defendant in the suit and the manager of the company. He admitted in cross-examination that he became an insolvent in 1955. He put forward a new case that his son is carrying on the business of the second defendant-company ever since he became insolvent and that his son has not come to give evidence on these cases. His explanation is that his son asked him to appear in these cases. The learned Seventh Assistant City Civil Judge has rightly pointed out that the plaintiff-company would not have given accommodation for a company owned by an insolvent. In fact, he has found that the above drafts and cheques which have been issued by the customers in favour of the plaintiff-company have been taken without the knowledge of the manager or partners of the plaintiff-company by the first defendant and that the first defendant had forged the endorsements and misappropriated the amounts paid to him. He has also found that there was a conspiracy between defendants 1 and 2. In fact, these findings were not challenged by the learned Advocate for the appellants.

3. Kanyalal Thakurdas is the third defendant in O.S. No. 2765 of 1959 and S.C. No. 17 of 1961 and Jethanand Thakurdas is the third defendant in O.S. No. 2838 of 1959 and S.C. No. 7 of 1960. Admittedly, the third defendant in these suits guaranteed the signatures on the prior endorsements on the cheques and drafts and collected the amounts from the several banks, who were the drawees of the cheques and drafts. The United Commercial Bank Ltd. is the fourth defendant in O.S. No. 2765 of 1959, and S.C. No. 17 of 1961, the Bank of Bikanir Ltd. is the fourth defendant, in O.S. No. 2838 of 1959 and Devakaram Najee Banking

Corporation is the fourth defendant in S.C. No. 7 of 1960. The suits against the fourth defendant have been dismissed as they were protected u/s 131 of the Negotiable Instruments Act. The case of defendants 1 and 2 is that the plaintiff-company accommodated the second defendant by endorsing the cheques and drafts and sent them through the first defendant, who was the accredited agent and representative. But the learned Seventh Assistant City Civil Judge, Madras, rejected this contention and passed a decree against defendants 1 to 3 in all the suits. Defendants 1 and 2 have not preferred any appeal. The third defendant in the suits, namely, Kanyalal Thakurdas and Jethanand Thakurdas, alone have filed the appeals and revision petitions.

4. The only point urged in these appeals and civil revision petition is that the plaintiff-company was negligent in having allowed the second defendant-company to seal the cheques and drafts and commit forgeries and hence the plaintiff-company cannot claim the amounts of the cheques and drafts from the appellants and petitioners herein. The learned Seventh Assistant City Civil Judge has referred to the following definition of a "banker" in Vol. 1, 2nd Edition of Halsbury's Laws of England, in dealing with the claim of the third defendant in these suits that they are bankers entitled to the benefit of Section 131, Negotiable Instruments Act:

A banker is an individual partnership or Corporation whose sole or predominating business is banking, that is the receipt of money on current or deposit account and the payment and collection of cheques drawn by or paid in by a customer.

5. He found that the third defendant in all these suits are not bankers entitled to the benefits of Sections 85 and 131 of the Negotiable Instruments Act. It is true D.W. 5, Purushotham Das, agent of Jethanand Thakurdas, and D.W. 6, Thakurdas, partner of Kanyalal Thakurdas, gave evidence that the third defendant in the suits are bankers. But it is clear from their evidence that they do only money-lending business, They have discounted the cheques and drafts concerned in these cases for commission.

6. u/s 3 of the Negotiable Instruments Act, a banker, includes any person acting as a banker and any Post Office Savings Bank. This decision does not define the term "banker". But according to Section 5(b) of the Banking Regulation Act X of 1949.

"Banking" means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise." A banker is one who in the ordinary course of business honours cheques drawn upon him by a person from whom and for whom he receives moneys on current account. The learned Advocates for the appellants did not attempt to canvass the correctness of the findings of the learned Seventh Assistant City Civil Judge that the appellants are not bankers entitled to the benefits of Section 131 of the Negotiable Instruments Act, which is as follows:

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 cheques proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

7. A banker who deals with a cheque in a manner contrary to the rights of the true owner is under common law liable in an action for conversion or trover. Section 131 of the Negotiable Instruments Act gives some protection to the banker in the same manner as Section 4 of the Cheques Act, 1957, in England. But this does not provide an absolute immunity to the collecting banker and unless he can bring himself within the conditions formulated in the Section, his common law liability for conversion remains. The conditions are (a) that the banker should act in good faith and without negligence in receiving payment, i.e., in the process of collection, (b) that the banker should receive payment for a customer, i.e., act as mere agent in the collection of the cheque, and not on his own account as holder, (c) that the person for whom the banker acts must be his customer, and (d) that the cheque should be one crossed generally or specially to himself (See Bashyam and Adiga on the Negotiable Instruments Act, 12th Edition, page 584). Commenting on the corresponding Section 4 of the Cheques Act, 1957, in England, Paget has stated at page 347 of his Law of Banking, 6th Edition, that the importation of negligence into that Section is in sense an anomaly. The author points out that there can be no negligence without a duty and that there is no contractual relation between the collecting banker and the true owner, giving rise to a duty on the part of the former to the latter. The banker's only contractual obligation is to his own customer and conduct beneficial to the customer at the expense of the true owner is no breach of that duty. At page 348 of the book, it is pointed out by the learned author that the duty is purely statutory one imposed on the banker in favour of the true owner and the negligence consists in the disregard of his interests, apart from those of the customer. The breach of the implied duty to the true owner is explained in the following terms at page 348 of the same book:

The assumption of this duty and liability to a stranger must be regarded as part of the price paid by bankers, for protection under statute. It is from the standpoint then, of the true owner that all questions of negligence under this Section must be viewed.

It would be futile to try and formulate particular conditions or circumstances which might or might not establish negligence in this connection. Broadly speaking, the banker must exercise the same care and forethought in the interests of the true owner, with regard to cheques paid by customer, as a reasonable business man would bring to bear on similar business of his own. This formula was approved by Sankey, L.J. in *Lloyds Bank Limited v. Chartered Bank of India, Australia and China* (1929) 1 K.B. 40. In *Underwood (A.L.) Limited v. Bank of Liverpool*¹, Bankers, L.J. adopts the test suggested by Lord Dunedin in *Taxation Commissioners v. English, Scottish and Australian Bank* (1920) A.C.

689, where he says that the bank's action must be in accordance with the ordinary practice of bankers.

8. In *Lloyds Bank Limited v. Chartered Bank of India, Australia and China* (1929) A.C. 689 Sankey, L.J. approved the view taken by Bailhache, J. In *Rose v. London "County, Westminster and Parr's Bank Limited* (1919) 1 K.B. 678 that he must attribute to the clerks and cashiers of the defendant-bank the degree of intelligence and knowledge ordinarily required of persons in their position to fit them for the discharge of their duties, but that no microscope examination of cheques paid in for collection was necessary. "It is not expected", he said, "that officials of bank should also be amateur detectives" In the same case, Scrutton, L.J. said that "to require a thorough enquiry into the history of each cheque would render banking business impracticable."

9. Having regard to the facts and circumstances of the case, it could hardly be said that the appellants acted in good faith and without negligence in collecting the amounts of the cheques and drafts. Except in the cheque Exhibit A-14, the appellants have not asked the second defendant, who was their customer, to guarantee the endorsement of the payee. The appellants have not cared to ask the plaintiff-company about the truth of the endorsements alleged to have been made by them. In fact, it should have aroused the suspicion of the appellants that the plaintiff-company who are dealers in cycles should have assigned the cheques and drafts of their customers to the second defendant-company who are dealers in potatoes. D.W. 5 Purushotham Das, the agent of Jetanand Thakurdoss, the third defendant in O.S. No. 2838 of 1965 went to the extent of stating that his firm guaranteed the endorsements on the cheques and drafts as a matter of course. The evidence of D.W. 6, Thakurdas, who is a partner of Kanyalal Thakurdas, the third defendant-firm in O.S. No. 2765 of 1959 and S.C. No. 17 of 1961 is that he did not ascertain whether the endorsements in the name of the plaintiff-company are genuine. Admittedly D.W. 6 did not enquire whether the plaintiff-company had any dealings with the second defendant. It is unnecessary to refer to the other reasons given by the learned Seventh Assistant City Civil Judge to show that the appellants did not act in good faith and that they have acted negligently in collecting the cheques and drafts of the plaintiff at the instance of the second defendant. Hence even if the appellants are bankers within the meaning of Section 131 of the Negotiable Instruments Act, they cannot claim the benefit of that Section.

10. The main contention urged in these appeals and revision petitions is that the plaintiff-company acted negligently and that on account of the said contributory negligence, the plaintiff-company is not entitled to recover the amounts of the cheques and drafts from the appellants. It is urged that the plaintiff-company should have kept the rubber seal under lock and key. The mere use of the rubber seal of the plaintiff-company is not sufficient to forge the endorsements on the cheques and drafts. In fact, the first defendant could have easily procured a duplicate rubber seal in the market. It is true the plaintiff-company did not

maintain any register to show the letters received every day, or a register showing that papers were given to each clerk. But the failure on the part of the plaintiff-company to maintain such registers cannot lead to the inference that it is negligent. The learned Seventh Assistant City Civil Judge has however observed that the evidence of P.Ws. 1 and 2 show that they did not have proper control and supervision over the first defendant and keep necessary registers, which would prevent fraud being committed, and that because of this negligence and want of proper supervision by P.Ws. 1 and 2, the first defendant on whom confidence was reposed, took advantage of it and handled the cheques and drafts dishonestly and fraudulently and forged them. On the strength of this finding, the learned advocates for the appellants urged that the plaintiff-company Was guilty of contributory negligence and it could not enforce the suit claim. They also pleaded that the plaintiff-company is estopped from enforcing the suit claim. But they were unable to point out any conduct or statement of the plaintiff which misled them to act in a way detrimental to their own interest to invoke the plea of estoppel defined in Section 115 of the Evidence Act.

11. Hence the only question to be considered in these appeals is whether the alleged contributory negligence on the part of the plaintiff-company is a valid defence to the suit claim. The law has been clearly stated at page 541 of Winfield on Tort, 7th Edition:

There is now in existence a body of academic opinion to the effect that in some cases of conversion at least, if the plaintiff's own negligence has contributed to his loss, the damages should be apportioned under the Law Reform (Contributory Negligence) Act, 1945, and the moral case for this seems strong. Why for example, should a plaintiff whose lack of ordinary care has not enabled a thief to make off with his property recover its full value from an innocent third party who bought the property from the thief in good faith. It is true that it is the plaintiff's property and that the thief can pass no title, but as Devin, L.J. has suggested, "the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party, in the whole or in the greater part. The question is, however, whether this is at all possible as the law now stands".

12. It is submitted that the question is probably to be answered in the negative. In *Bank of Ireland v. Evans Trustees* (1955) 5 H.L.C. 389 the trial Judge had directed the Jury that if the plaintiffs' loss had been caused by their own negligence then the defendant was absolved, but of this the Lord Chancellor said, "I apprehend that there is no such principle of law. I think that there must be something that amounts to an estoppel or something that amounts to a ratification, in order to make the negligence a good answer." That case, it is true, was decided at a time when contributory negligence, if a defence at all, Was complete defence and its use in cases of conversion would therefore have had the result of depriving a plaintiff of his property altogether on account of some

initial carelessness. This consequence, the Courts were not prepared to accept. As Lord Mannaughten said, in a famous passage:

if I lose a dog and find it afterwards in the possession of a gentleman who bought it from somebody whom he believed to be the owner, it is no answer to me to say he never would have been cheated into buying the dog if I had chained it up or put a collar on it or kept it under proper control... If that be so, how can carelessness, however extreme, in the conduct of a man's own business preclude him from recovering his own property which has been stolen from him?

13. It is clear from page 169 of the Law of Torts by Section Ramaswami Iyer, Fifth Edition that contributory negligence is not one of the defences open to a defendant in an action for conversion. In *Bapulal Premchand Vs. The Nath Bank, Ltd.*, it has been held that, however negligent the true owner may be it can be no answer by the person who converts the article that he should be let off from his liability because of the negligence of the true owner. It is also pointed out in the same decision that but for the protection afforded to the Bank by Section 131 of the Negotiable Instruments Act, the Bank would have no defence whatever to the claim of the plaintiff.

14. For the foregoing reasons, we find that the appellants are not entitled to rely on the alleged contributory negligence on the part of the plaintiff-company as a defence for their having collected the cheques and drafts of the plaintiff-company and committed the tort of conversion. The decrees and judgments of the learned seventh Assistant City Civil Judge are confirmed and the appeals and civil revision petitions are dismissed with costs of the respondent-plaintiff.