

(1958) 12 GAU CK 0006

In the Gauhati High Court

Case No : Misc. Appeal (First) No. 39 of 1955

Kesarichand Jaisukhlal

APPELLANT

Vs

Shilong Banking Corporation Ltd.

RESPONDENT

Date of Decision : 22-12-1958

Acts Referred:

Banking Companies Act, 1949 — Section 45D, 45O
Contract Act, 1872 — Section 63
Limitation Act, 1908 — Article 57, 64, 85
Negotiable Instruments Act, 1881 (NI) — Section 82

Citation : AIR 1959 Guw 162

Hon'ble Judges : Sarjoo Prosad, C.J;G. Mehrotra, J

Bench : Division Bench

Advocate : S.K. Ghose, P. Choudhuri and N. Sarma, for the Appellant; S.M. Lahiri, Advocate-General, N.M. Dam and T.N. Singh, for the Respondent

Final Decision : Dismissed

Judgement

Sarjoo Prosad, C.J.—This appeal is directed against an order dated 2-5-1955, passed by a Judge of this Court under the Banking Companies Act, adjudging the appellant as a debtor to the Shillong Banking Corporation Limited in liquidation. The claim of the bank is that the defendant No. 3, the appellant here, M/s. Kesarichand Jaisukhlal of Paltanbazar, Shillong, is liable for the payment of a sum of Rs. 5,965/5/9, the amount due to the bank, with interest at nine per cent. per annum calculated from 1-/1947 onwards. The total claim has been laid for both principal and interest at Rs. 10,150/5/9.

The claim is based upon the statement of account filed in the case (Ext. 1). The claim has been resisted by the appellant substantially on three grounds. It is contended that the debt due if any was paid off; that it was barred by limitation; and that in any case the bank was not entitled to the recovery of any interest, except pendente lite. The learned Judge who dealt with the matter, has found all these points against the defendant-appellant and accordingly this appeal has been preferred by him.

2. The most substantial question is the plea of payment set up by the defendant. The material facts have not been controverted. It appears that the defendant made over two cheques to the plaintiff bank for a total sum of Rs. 8,800/-. Cheque No. C. D. 0887 was for a sum of Rs. 600/- and Cheque No. C. D. 0888 for a sum of Rs. 8,200/-. These cheques were drawn on the Bharati Central Bank Ltd., Shillong Branch on 9-12-1946 and they were made over to the plaintiff bank for collection and crediting the amount towards the defendant's account which showed an overdraft.

The cheques were duly presented for collection by the Plaintiff to the Bharati Central Bank the same day; but the latter bank instead of making cash payment of the amount, issued a crossed cheque for the entire sum of Rs. 8,800/- on the Shillong Branch of another bank called the Nath Bank Limited. When this cheque of the Bharati Central Bank was presented to the Nath Bank on 10-12-46 for collection, the same was returned with a slip indicating that full cover for the amount in question had not been received.

The cheque was again presented to the Nath Bank the following day, that is, on 11-12-1946 for collection; but it had no better result. The plaintiff bank then asked for cash payment and immediately returned the cheque issued by the Bharati Central Bank. From the plaintiffs accounts it appears that on the 9th December when the defendant handed over his two cheques to the plaintiff bank, it credited the amount in favour of the defendant, but later, on the 11th December when these payments were not obtained in satisfaction of the cheque issued by the Bharati Central Bank and drawn on the Nath Bank, the plaintiff Bank debited the defendant's account to that extent

When the plaintiff bank asked the Bharati Central Bank for cash payment of the amount and returned the cheque issued, the latter sent a letter on 13-12-1946 wherein the Manager requested the plaintiff bank to accept a demand draft in lieu of cash payment. Demand Draft No. 47830 was accordingly issued by the Bharati Central Bank for a sum of Rs. 8,800/- to cover the cheques issued by M/s. Kesarichand Jaisukhlal, the defendant-appellant.

This demand draft was drawn on the head office of the Bharati Central Bank of Calcutta. The plaintiff bank immediately sent the draft for collection through its local branch in Calcutta but the demand draft was not honoured, in spite of repeated presentation; and in the meantime it appears that the Bharati Central Bank obtained an order of moratorium u/s 153 of the Indian Companies Act.

Finally on 2-1-1947 they returned the demand draft with the note "payment stopped under reconstruction scheme admitted by the High Court this day". The Calcutta Branch of the Shillong Banking Corporation then returned the demand draft to the head office of the bank at Shillong and the matter stood where it was. The net result is that the plaintiff bank did not obtain payment of the amount of Rs. 8,800/- from the Bharati Central Bank on which the cheques had been drawn by the defendant appellant.

3. The case of the plaintiff is that it made every effort to collect the money under those cheques, issued by the defendant, and whatever step was taken was taken by the bank in consultation with the defendant orally and by phone, the defendant being a local party in whom it had confidence; and there was no lack of care or due diligence in the matter so far as the bank was concerned. This case of the plaintiff bank is however denied by the defendant.

The defendant alleged that the bank had of its own accord accepted the demand draft from the Bharati Central Bank and that being so, the bank has to suffer if it failed to obtain payment in respect of the demand draft; so far as the defendant is concerned the liability if any, was extinguished by the fact that the Bharati Central Bank had honoured the cheques issued by the defendant-appellant and issued the demand draft in lieu of payment to the plaintiff bank which the latter had duly accepted at its own risk.

Before the learned judge who dealt with the matter at the trial, the argument proceeded on the basis that the plaintiff bank was careless and negligent in collecting the amount payable on account of these cheques and consequently the defendant had no liability in the matter when the demand draft could not be cashed on account of the negligence of the plaintiff bank. In the alternative it was argued that the bank must suffer for the failure to get payment of the demand draft because it accepted the demand draft on its own responsibility and without the consent of the defendant. On both these points the learned Judge found against the defendant.

4. The plaintiff examined on its behalf an assistant of the Shillong Banking Corporation who proved the statement of account (Ext. 1). He says that the accounts were kept in regular course of business and represent the true state of the transactions between the parties. His evidence further proves that the last transaction with the defendant No. 3 was on 29-12-1950 when the latter paid a sum of Rs. 2,997/8/-, as the entry in the accounts shows, in part satisfaction of his liability.

This last payment was by means of a cheque which the bank collected. The entries of course do not show that any interest was added after the date in question or even prior to that date since 30-6-1947; but we will come to the claim for interest later. The witness further says that after the last payment to which he referred, there was no other payment by the defendant and therefore the amount remained due in the defendant's mutual and current account with the bank, until the bank went into liquidation on 26-5-1953.

In regard to the two cheques issued by the defendant on 9-12-1946 the witness deposes as to the efforts made by the plaintiff Banking Corporation for collection of the amount from the Bharati Central Bank. He refers to the fact that the Bharati Central Bank gave at first a cheque on the Nath Bank in lieu of payment; and although this cheque was repeatedly presented to the Nath Bank on whom it was drawn by the Bharati Central Bank, the Nath Bank did not make any

payment and the cheque of the Bharati Central Bank stood dishonoured.

He narrates that on the first day when the Nath Bank returned the cheque of the Bharati Central Bank because full cover was not received as per Ext. 2, the plaintiff bank informed the defendant appellant about this and under the defendant's instructions the cheque was again presented the next day to the Nath Bank when it was again returned with a memorandum as per Ext. 3. It was then that the plaintiff bank debited the amount on 11-12- 1946 in the account of the defendant

The witness also states that when the Nath Bank Limited ultimately refused payment, the plaintiff bank contacted the defendant and under his instructions it accepted a demand draft on 13-12-1946 from the Bharati Central Bank, Shillong for the identical amount issued on its Calcutta Branch for collection. The Bharati Central Bank also sent a covering letter (Ext. 4) asking the plaintiff bank to present the demand draft to its Calcutta Branch.

The covering letter bears the same date. According to the witness the demand draft was presented to the Calcutta Branch of the Bharati Central Bank, but the latter requested by a letter dated 16-12-46 (Ext. 5) to present the same to their Shillong Branch and returned the demand draft. The defendant was again informed on the telephone and subsequently also by a letter (Ext. 6) dated 11-1-1947 to which the defendant replied on 28-1-1947.

These letters of course were exchanged after the payment of the demand draft had been finally refused on account of the moratorium order on 2-1-1947. If this evidence is accepted, there can be no doubt that the demand draft was obtained with the consent of the defendant and it was not merely at the initiative of the plaintiff bank as alleged. The defendant has not examined Himself or anybody else to controvert the statement of this witness who has proved not only the entries in the statement of accounts but also the various events which happened and how the defendant was from stage to stage informed of the matter.

The witness has also proved the entry in regard to the last payment made by the defendant. He admits that no formal note in writing was sent to M/s. Kesarichand Jaisukhlal, the appellant; but this he explains on the ground that the defendant was a local party and he appears to have been on the best of terms with the bank. The dealings between the parties both before and after the issuance of the cheques in question support the evidence of this witness.

5. I have already referred to the fact that although the account was credited for the amount of the cheques on 9-12-1946, two days afterwards when the cheque issued by the Bharati Central Bank in lieu of defendant's cheques could not be cashed on the Nath Bank, the defendant's account was debited to that extent. After that it has been argued by the learned counsel for the plaintiff that the plaintiff bank was in the position of an agent and held the defendant's cheques merely for collection as such and whatever was done by the plaintiff bank thereafter, was done merely as an agent of the defendant, and with the

defendant's consent, in collecting the amount on his behalf.

There being no negligence or delay in the matter of collection as the facts show, the plaintiff bank could not be responsible for the non-payment of the demand draft. Even after the debit entry transactions went on between the parties and deposits and withdrawals continued as before until 30-6-1947, when we find an overdraft entry in the account of the defendant to the tune of Rs. 8,962/13/9. After that there is the disputed payment of Rs. 2,997/8/- shown on 29-12-1950.

If actually the defendant had objection to the entries made in the accounts and he claimed that the amount of the cheques issued by him should have been duly credited, there is no reason why he should not have insisted upon the statement of the accounts being corrected accordingly. The witness for the plaintiff has definitely stated that a statement of the account is issued to the client concerned in the normal course of business; and we have no reason to assume otherwise when the defendant has not examined himself to prove that he never received any such statement and therefore he had no knowledge of the accounts.

It is therefore difficult to believe that during the period that the transactions continued between the parties, the defendant would not have objected to the entries made in the accounts and the omission to give him credit for the amount of the cheques which had been issued by him when the accounts showed an overdraft to the tune of about Rs. 9,000/-. The letter of the 11th January 1947 fully corroborates the evidence of the witness examined on behalf of the plaintiff bank.

The letter shows that the defendant was verbally informed of the debit entry in the accounts on 11-12-1946, pending realisation of the pay order issued in payment of the same. He was also verbally kept informed of the said pay order and it was with his verbal sanction that the bank obtained from the Bharati Central Bank, Shillong a demand draft on their head office, when their cheque on the Nath Bank, Shillong was dishonoured.

The letter further informs the defendant that the bank was holding the demand draft as well as the cheque on the Nath Bank Limited, Shillong and would await the defendant's instructions in the matter for necessary action. The defendant replied to this letter more than a fortnight later when it repudiated the suggestion that the demand draft was obtained at their instance and asserted that the bank had taken it at its own risk and responsibility.

This reply is belated and we see no reason to distrust the evidence of the plaintiff bank on the point which is more consistent with the course of dealings between the parties. It would of course have been better if the bank had in writing from time to time informed the defendant about the various stages and obtained the defendant's consent, but in the circumstances of this case the Assistant's evidence that orally and on the phone the defendant was kept informed of the matter appears to be convincing and has been rightly accepted by the learned Judge at the trial.

The learned Judge points out that the defendant was on the best of terms with the bank authorities in December 1946 and every attempt was made by the petitioner bank to collect the amount from the Bharati Central Bank; the defence of the defendant as set out in his letter of the 28th January shifting the responsibility to the collecting bank was as a result of after-thought.

6. A case in point is the decision in *In Re: Alliance Bank of Simla in Liquidation*, where the Alliance Bank of Simla received certain cheques from its customers for the credit of their accounts which were dishonoured by the Chartered Bank and upon which the Alliance Bank reversed their original credit to its constituents' account, in respect of those very cheques. It was held that the action of the Alliance Bank in reversing the credit was consistent with their having received cheques only as agents for collection and with the fact that they never placed any money to their customers' credit to draw upon.

It was held further that if as a matter of fact the proceeds of the cheques were actually collected and the relation of the banker and customer established, it would not have been open to the Alliance Bank to reverse their original credit to their constituents' account. Therefore the cheques in question must be deemed to have not been finally cleared. In this case we find that the position was almost the same when the plaintiff bank made a debit entry in the books of account in regard to the cheques issued by the defendant, in view of the fact that the amount had not been collected.

As a result of the debit entry Mr. Lahiri is right in contending, the plaintiff bank was reduced to the position of a mere agent and made all efforts to collect the cheques with the consent of the defendant as an agent, but failed to get the amount. It has been adequately proved that there was no negligence on the part of the plaintiff in the matter of collection. Therefore it cannot suffer if the demand draft could not be cashed and the liability of the defendant in respect of the amount continued to subsist.

7. Mr. Ghose has next contended that in any case as soon as the plaintiff bank obtained the demand draft, the liability was satisfied and the cheques issued by the defendant would be deemed to have been paid. We have already held in *"Mohanlal Jogani Rice and Atta Mills v. Ramlal Onkarmal Firm (S) AIR 1957 Ass 133* that a demand draft is as much a conditional payment as a cheque or any other bill of exchange and it all depends upon the circumstances whether actually the issue of the demand draft satisfied the liability.

It was held there that

"a draft is as much a bill of exchange as a cheque and there is hardly any difference between a dishonoured draft and a dishonoured cheque issued by a bank on itself. It is very nearly allied to a cheque and the difference between it and a cheque consists largely in two facts; firstly, that it can be drawn only by a bank on another bank and not by a private individual as in the case of cheques and secondly that it cannot be so easily countermanded as a cheque either by

the person purchasing it or by the bank to which it is presented."

Here the demand draft was also issued by the Bharati Central Bank on its own branch as a conditional payment to cover the cheques issued by the defendant on the said Bharati Central Bank and when in fact the demand draft could not be cashed, the defendant cannot contend that nevertheless the plaintiff bank obtained satisfaction of the amount covered by the cheques issued by the defendant. Mr. Ghose has tried to challenge the correctness of the previous decision but so far as we can see, nothing of any significance has been suggested to induce us to revise the view which was then taken.

It is wrong to suggest here as it was erroneously sought to be suggested in the earlier case also that the issue of the demand draft in the circumstances was the same thing as purchasing it for cash payment at the counter. The position therefore remains that the plaintiff bank did not obtain any payment on account of the cheques issued by the defendant and the liability as shown in the statement of accounts was not extinguished by any such plea as the defendant has set up.

There is also nothing to show that the defendant had sufficient funds with the Bharati Central Bank at the time so as to enable that bank to honour the cheques in question; but anyhow it is not necessary for us to investigate that question, because even on the assumption that the Bharati Central Bank had issued the cheque or the demand draft with a view to honour the defendant's cheques, the fact remains that no payment was obtained on account of the demand draft and liability of the defendant in respect of the original consideration as shown in the books of account remained as it was.

8. Another contention of Mr. Ghose on this topic is that the plaintiff Bank has already claimed as a creditor of the Bharati Central Bank on the strength of the cheques issued by the defendant and therefore cannot fall back upon the original debt. The answer to the contention is that even in the other liquidation proceeding in respect of the Bharati Central Bank, the plaintiff is claiming as an agent and on behalf of the defendant. This is clear from the very first paragraph of his petition and the learned Judge of this Court has already directed that in case any sum is realised from the Bharati Central Bank in payment of the defendant's cheques, the said amount would be adjusted towards the dues of the defendant to the plaintiff Bank.

9. The next question which arises is the question of limitation. It has been faintly suggested by the learned counsel for the appellant that the proper article applicable to the case is either Article 57 or Article 64 of the Limitation Act. Article 57 applies in the case of money payable for money lent and the period of limitation is three years from the date when the loan is made; while Article 64 is for money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.

The period of limitation under Article 64 is three years, running from the date

when the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf. These articles have really no application to the case in hand and the appropriate article applicable is Article 85 of the Limitation Act, which relates to the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties; in such a case it is three years limitation running from the date of the year in which the last item admitted or proved is entered in the account.

This is a case of mutual and current account between the parties in which there are shifting balances and reciprocal demands as proved by the entries themselves; and the last entry, as proved by the witness is the payment of Rs. 2,99/-8-0 on 29-12-1950. Therefore the period of limitation starts running from the date in question.

10. It has been argued that this entry as to payment on 29-12-1950 should not be taken to be genuine. The entry has been made in the books of account kept in regular course of business by the Bank and the presumption is that the entry is correct, though by itself the entry may not be sufficient to fasten liability. The transaction represented by the entry has been further proved by the Assistant examined on behalf of the plaintiff who says that the amount was collected by a cheque which the defendant presented to the plaintiff bank and which was accordingly credited in his accounts.

It is true that there are no entries of transactions either prior to this date of payment ever since 30-6-1947, or subsequent to this date of payment, until January 1954; but this circumstance alone is not enough to discredit the entry, specially when the defendant himself has not ventured to depose to rebut the correctness of the entry in question. In the circumstances we have to act on the genuineness of this entry as representing the true state of affairs, namely that on this date the amount of Rs. 2,99/-8-0 was paid and duly credited in the accounts of the defendant.

The period of three years would therefore run from the date of this last item as entered in the accounts. It is not necessary to consider at present whether the limitation would not run from 2-1-1954, which is the last entry in the accounts, because according to the case of the plaintiff the accounts remained open till that date when they were actually closed.

11. The two cases on which the learned counsel for the appellant has relied in support of his contention that it was not a case of mutual and current account, do not really apply to this case. It was held in *Uma Shankar Prasad Vs. Bank of Bihar Ltd. and Another*, that an open and current account between the parties must still be shown to be a mutual account to attract the provisions of Article 85 of the Limitation Act.

According to the learned Judges

"Mutual, open and current account means a course of dealing where each party

furnishes credit to the other on the reliance that on settlement the accounts will be allowed, so that one will reduce the balance due on the other. To be mutual, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

In this case an examination of the entries in the accounts clearly shows that there was a course of dealing wherein from time to time each party furnished credit to the other on reliance that eventually when the accounts come to be settled the credit given by the one will reduce the balance due on the other. It was not merely a case of one-sided dealing where the other party was merely making partial discharges of his obligation. The decision in *Basanta Kumar Mitra Vs. Chota Nagpur Banking Association, Ltd.*, is also clearly distinguishable on facts.

It was there held that the fact that there are oscillating balances in favour of the two parties is not decisive in determining whether the account is a mutual account. The test is not that there must be a shifting balance, but that such was a possible and likely incident of mutual transactions in regard to which the account was kept. This test in my opinion applies to the present case.

The reason why in the case in question the learned Judges felt that the test did not apply was because there the customer continued to overdraw on the bank being always a debtor to the bank, though from time to time it also made certain payments in satisfaction of the loan advanced. Therefore where a customer of a bank draws a cheque on it knowing that the funds at his credit were insufficient to meet it but expecting the bank nevertheless to honour it, he impliedly applies to the bank for an overdraft or a loan.

In such a case it may well be observed that Article 57 of the Limitation Act may apply because each transaction is an independent loan, limitation for recovery of which may fall under that article, subject of course to payments made from time to time. The case more in point is a decision in *R.N. Kapur, partner of Wright and Co. Vs. The Travancore National and Quilon Bank, Limited (in liquidation) by Official Liquidator and Others*, where it was held that where a customer of a bank has a current account which at times is in credit and at other times is in debit, the bank having granted the customer the right to overdraw, Article 85 and not Article 57 applies to the case.

12. Mr. Ghose however argues that even if it is held that Article 85 of the Limitation Act applied, the application is still barred by limitation because in this case the application for adjudging the defendant as a debtor u/s 45-D of the Banking Companies Act was filed on 28-6-1954 which is well beyond three years from the date of the payment on 29-12-1950. He contends that Section 45-O of the Banking Companies Act will not operate to save limitation.

In this connection some relevant dates are material. The application for liquidation was filed on 26-2-1953 and the order of liquidation was passed on

26-5-1953. Section 45-D of the Banking Companies Act provides that the official liquidator shall, within six months from the date of the winding up order or the commencement of the Banking Companies (Amendment) Act, 1953, whichever is later, from time to time file to the High Court lists of debtors containing such particulars as are specified in the Fourth Schedule.

It also provides that such lists may with the leave of the High Court be filed even after the expiry of the said period of six months. It is not disputed that the application in the present case was filed within six months of 30-12-1953 when the Act came into force. Section 45-O further says that notwithstanding anything to the contrary contained in the Indian Limitation Act or in any other law for the time being in force, in computing the period of limitation prescribed for a suit or application for a banking company which is being wound up, the period commencing from the date of the presentation of the petition for the winding up of the banking company shall be excluded.

Mr. Ghose contends that though Section 45-O says that the period commencing from the date of the presentation of the petition for winding up shall be excluded, it does not mention the terminus of the period which may be taken into account. According to the learned counsel, the period terminated when the order of liquidation was made, that is on 26-5-1953. Therefore the learned counsel contends that even if Article 85 of the Limitation Act applied and the benefit of Section 45-O of the Banking Companies Act was given to the plaintiff bank, the application was still barred by limitation.

Of course if the debt had become barred under the law of limitation before the initiation of the liquidation proceedings or the presentation of the application, the debt could not be revived merely because an application was presented within time u/s 45-D of the Act for adjudging the debtor concerned as a debtor of the bank in liquidation; but where on the date of initiation of the liquidation proceedings the debt has not been extinguished, then by virtue of Section 45-O the debt will continue to subsist, even though the application for settlement of the list of debtors is made at a time when under the law of limitation the debt may have become barred.

In such a case the liability for the payment of the debt would be saved u/s 45-O of the Act. Having given our anxious consideration to the language of Section 45-O of the Banking Companies Act we are inclined to think that the terminus should be not only the date of the order of liquidation but the termination of the winding up proceeding itself. In other words, the obvious intention of Section 45-O of the Act is that the period of limitation as it were, remains suspended throughout the liquidation proceedings.

The law has given a special privilege in cases where liquidation proceeding has been started to obtain speedy relief from the Court in respect of collection of the assets of the bank in liquidation, provided the assets are alive and recoverable and have not become barred before the proceedings are initiated. The intention

of Section 45-O of the Banking Companies Act therefore is that upto the stage or winding up of the company, the limitation will stop running against the banking company. This interpretation is consistent with the object and purpose of the Act itself and the language of Section 45-O.

Therefore the period commencing from the date of the presentation of the petition for the winding up of the banking company and upto the date of winding up, should be excluded. We do not think that the intention was to confine the extent of the period only to the date of the liquidation order. In the circumstances there can be no doubt that the claim of the plaintiff was not barred by limitation and we agree with the learned Judge that the liability for payment of the debt still subsists.

13. On the point of interest we see no reason to differ from the decision of the learned Judge either. It is true that in the account itself there is no interest calculated after 30-6-1947; nevertheless the bank is entitled to some reasonable rate of interest on the amount due and the Court in this case has! directed payment of interest at six per cent per annum, thereby modifying the claim. This appears to be a reasonable rate of interest which the defendant should be liable to pay.

14. We therefore see no substance in this appeal which is accordingly dismissed with costs.

G. Mehrotra, J.

15. I agree.