
(1954) 01 MAD CK 0025
In the Madras High Court
Case No : C.S. No. 71 of 1953

K.M. Abbu Chettiar

APPELLANT

Vs

Hyderabad State Bank

RESPONDENT

Date of Decision : 29-01-1954

Acts Referred:

Contract Act, 1872 — Section 212

Negotiable Instruments Act, 1881 (NI) — Section 10, 82

Citation : AIR 1954 Mad 1001 : (1954) 24 CompCas 221 : (1954) 1 MLJ 566

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Advocate : C.E. Padmanabhan and Short Bawes and Co, for the Appellant; K.S. Varadachari and M. Anantharaman, for the Respondent

Judgement

Ramaswami, J.—The suit is for ordering the defendant, the Hyderabad State Bank Ltd., forthwith to release and deliver over to the plaintiff Abbu Chettiar the goods, viz., 4050 bags of gingelly oil seeds described in the plaint schedule and for damages of Rs. 1800 and for an interim order directing the defendant to deliver over to the plaintiff the said goods and for costs.

2. The case for the plaintiff is as follows: He is a merchant carrying on business in gingelly, caster and groundnut oil as manufacturer and wholesale dealer and distributor with head office at No. 81, Perambur Barracks Road, Vepery, Madras, and branches all over the City. The defendant, the Hyderabad State Bank Ltd., with its Head Office in Hyderabad State, has its branch office at Linghi Chetty Street, George Town, Madras. The plaintiff had dealings with the defendant bank on a produce loan account.

On the forenoon of 23-12-1952 the plaintiff sent his clerk, Rukmangadan, P. W. 4, with a cash of Rs. 2000 to pay it into the bank and settle the produce loan account in which according to the plaintiff the balance due was Rs. 1255-14-6 plus interest and get a release of the goods and for which purpose take the key of the godown from the bank. On this Rukmangadan going to the bank and

tendering the amount due as per instructions of Abbu Chettiar and asking back for the key he was informed by the bank clerk, Ramanathan, D. W. 1, that what was due was Rs. 16,000, apart from interest and not the sum tendered. Rukmangadan says that he was taken aback and asked for information, and found out that a bearer cheque MsIC No. 007215 for Rs. 15,000, drawn on self and signed by Abbu Chettiar has been cashed that morning at about 10-10 A.M. by a person describing himself as T. Annamalai Chettiar, 81 Perambur Barracks Road, Vepery, Madras, & who has endorsed his name & address on the back of the cheque. Therefore this Rukmangadan phoned up his master who was then performing annual ceremony in his house.

Abbu Chettiar accompanied by others ran to the Bank, verified this information, looked into the cheque mentioned above and protested that his signature had been forged and that he had not sent any Annamalai Chettiar to cash any cheque. This matter was taken promptly to the notice of the North Beach Police Station by the Bank through the accountant Bijoor and by Abbu Chettiar. This Abbu Chettiar gave a complaint by 11-30 A.M. and the North Beach Police Station registered it as Crime No. 794/52 under Sections 380 and 467, I. P. C., in which this Abbu Chettiar has stated that his signature had been forged and a sum of Rs. 15,000 had been drawn from the Hyderabad State Bank without his knowledge and that on checking the cheque book it was found that five leaves viz., Nos. 007212 to 007216 were missing. The Sub-inspector of Police, Mr. Abdul Wahab examined as P. W. 2 investigated this complaint and came to the conclusion that the work must be an inside job viz., of someone in the household of Abbu Chettiar or closely connected with one such person having access to the cheque book normally kept inside an iron safe outside business hours and in the office room during the business hours and that the crime was undetectable.

Thereafter this Abbu Chettiar issued a notice to the bank asking them to make good the sum of Rs. 15,000 and on the refusal of the Bank has filed this suit for the reliefs mentioned above, because the Bank has refused to release the goods on the foot that they properly honoured the cheque of Abbu Chettiar.

3. The case for the Bank is three-fold, viz., that the signature of the plaintiff as drawer of the bearer cheque in question is not a forgery and that during the period of the plaintiff's account with the defendant bank the bank has come to know that the plaintiff used to sign blank cheques and leave the same with his office for the purpose of business emergencies and that when the plaintiff turned up at the Bank immediately after receiving the phone message and examined the cheque in question did not deny then and there and state that the signatures in the cheque were not his and far from charging the defendant bank with any negligence was bitterly complaining that some one in his employ in collusion with his enemies had taken advantage of the situation and circumstances and had betrayed the confidence that he had reposed in him; secondly, that the plaintiff by his own conduct or negligence is said to have occasioned or contributed to the loss; the plaintiff was invariably drawing cheques payable to bearer and for very

large sums and was getting them cashed through various persons about a dozen of them, both strangers and relatives, in his employ from time to time even after he reported about the two missing cheque leaves and warnings were given by the defendant bank of the probable serious consequences in case of repetitions of theft. He has been culpably and criminally negligent and guilty of breach of duty which he owed to the defendant Bank to take the necessary precautions to prevent a repetition of the same. Thirdly, the forgery in this case, if it is a forgery, was so cleverly executed that the Banker was not able by any amount of care to ascertain whether or not his customer's signature was a forgery.

4. On these pleadings the following issues were framed:

1. Are the signatures of the plaintiff in the cheque in question forgeries?
2. Did the plaintiff owe a duty to the defendant Bank in the circumstances set out in para 7 of the written statement?
3. Is the plaintiff entitled to the damages claimed?
4. To what relief are the parties entitled?
5. The substance of the controversy can be resolved into three points viz., whether the signatures of Abbu Chettiar on the cheque in question have been forged; secondly, whether there was contributory negligence on the part of Abbu Chettiar disentitling him to the relief asked for; and thirdly, whether the forgery was so cleverly executed that the banker by any amount of care would not have been able to find out whether or not his customer's signature was a forgery. I shall deal with these points one by one.

6. POINT 1: That the signatures of Abbu Chettiar have been forged can admit of no doubt whatsoever and this is established by the following five circumstances.

First of all, Abbu Chettiar is a respectable merchant of this City and has a turnover of 40 lakhs of rupees per annum, pays a house-tax of Rs. 3,000, land tax of Rs. 600 and Income Tax of Rs. 75000 and is worth three to four lakhs of rupees. He impressed me in the box as a thoroughly dependable old type of substantial merchant. This Abbu Chettiar swears positively that he did not sign this cheque and that his signatures found therein are not his. There is no reason to distrust his testimony.

Secondly, immediately after receiving the phone message that a cheque for Rs. 15,000 said to have been drawn by him on self had been cashed, he had run to the Bank, explained the true state of affairs to the Bank manager and has made a complaint to the Police.

Thirdly, the investigation by the Police established that the cheque had been forged but that in the circumstances it was not possible to discover who had committed the forgery and encashed the cheque and appropriated the proceeds. That is why the complaint was referred as undetectable and not as a mistake of fact or as false.

Fourthly, a comparison of the signatures of Abbu Chettiar on this cheque with the specimen signatures and admitted signatures of Abbu Chettiar on cheques drawn on this defendant bank and filed in Court clearly shows that the two letters in "Appu" and in "Chettiar" are absolutely different and have not been made by the same hand. This is admitted by the bank accountant Bijoor.

Fifthly, the present story of the defendant Bank set out above that the plaintiff did not deny then and there that the signatures in the cheque were not his and that on the other hand he was complaining about abuse of trust suggesting that a blank cheque signed by Abbu Chettiar must have been misused, is not to be found in the belated reply notice given by this defendant bank on 22-1-1953. This notice also does not further refer to the bank warning Abbu Chettiar and Abbu Chettiar continuing to be criminally negligent. On the other hand the reply notice is vaguely worded as follows:

"My clients state that they made the payment for the cheque in question in due course, according to the tenor of the instrument, in perfect good faith and without any negligence whatever, and after having reasonably satisfied themselves regarding the signature in the cheque, now being questioned by your client,"

and nothing more.

Therefore, it may be taken as established beyond doubt by the plaintiff on whom the burden lies (*Punjab National Bank Ltd. v. Mercantile Bank of India Ltd.*", 8 Ind Cas 981 (Bom) (A), Per Russel C. J.) that the signatures on the cheque in question have not been made by Abbu Chettiar and are forgeries.

7. POINT 2: The alleged contributory negligence on the part of Abbu Chettiar has not been established and on the other hand the very facts alleged show culpable negligence only on the side of the bank. First of all, it is stated that this plaintiff has been drawing cheques payable to bearer for very large sums. This allegation is no doubt true. But then there is no evidence to show that this bank has also been issuing not only cheque books containing bearer cheques as well as order cheques and that this plaintiff was persisting in using only bearer cheques after the advantage of using order cheques has been pointed out to him. In fact all the cheques issued by this Abbu Chettiar are all bearer cheques throughout the period he was having transactions with this bank.

Secondly, it is stated that this Abbu Chettiar has been sending about a dozen persons, strangers and relatives, in his employ to cash these bearer cheques in order apparently to imply that the bank had become accustomed to pay indiscriminately all and sundry purporting to come from Abbu Chettiar's place. But as a matter of fact when all the cheques issued by Abbu Chettiar on this bank are looked into, they are practically almost always in favour of P. K. Rukmangadan, P. W. 4, or Munuswami. In fact the shroff says he started wondering, according to himself, when a stranger presented this bearer cheque on that day and enquired that person and ascertained that he was one

Annamalai Chettiar in the employ of Abbu Chettiar. It is also mentioned by him that he found out from him that the other two usually coming with the cheques had gone on other duty. This one circumstance should have put the bank on notice and they should have phoned up and found out about this stranger seeking to cash a bearer cheque for Rs. 15,000.

Thirdly, it is stated that Abbu Chettiar reported about the loss of two cheque leaves and that the Bank warned him of the probable serious consequences in case of repetitions of theft. This allegation seems to be one of hindsight and there is nothing to show that any such warning was given to this Abbu Chettiar beyond the stereotyped reply given to Abbu Chettiar as is done by every bank, viz., that the bank will register instructions from the drawer regarding the cheques lost, stolen etc., but cannot guarantee constituents against loss in such cases in the event of the cheque being paid. Once again when the bank has made a note of the loss of these two leaves in the ledger account of Abbu Chettiar, it ought to have been doubly cautious when a perfect stranger presented a cheque for Rs. 15,000 at a fairly unusual part of the day, viz., immediately after the bank opened at about 10-10 A.M. and especially when they have had the means to communicate with Abbu Chettiar by phone and obtain his confirmation or protest.

Fourthly, it is stated that even after the theft of the two cheque leaves from his cheque book, this plaintiff has been culpably and criminally negligent and guilty of the breach of duty which he owed to the defendant bank to take the necessary precautions to prevent a repetition of the theft.

The instructions of the Bank are printed on the fly-leaf, on the outer page and inside. This Abbu Chettiar has not been shown to have neglected any of these instructions. He has been keeping the cheque book after business hours in the iron box under lock and key. He has been counting the cheques before using them and that is why he has promptly reported about the loss of two leaves. In this case five leaves have been stolen obviously after he had the last use of the cheque book and before this discovery was made. Conditions 3 and 4 printed outside as well as Nos. 1 to 4 printed on the inside do not arise in this case. On hearing from the Bank that a cheque for Rs. 15,000 had been cashed and which he had not issued, the plaintiff had run up within a few minutes to the Bank. Therefore, I am unable to see any contributory negligence on the part of this plaintiff and what has happened is only his misfortune and not on account of any want of due care and attention on his part.

8. POINT 3: The contention of the bank is twofold. First of all, they went to imply that the signatures are genuine signatures and that a blank cheque signed by this plaintiff must have been made use of by the culprit. Secondly, that even if the signatures are not genuine signatures on a blank cheque later filled up by the culprit, the forgery is so cleverly executed that the banker cannot by any amount of care ascertain whether or not his customer's signature is a forgery.

In regard to the former, there is no evidence that the plaintiff oil merchant who impressed me as a shrewd and careful and suspicious man has been signing blank cheques. In fact the plaintiff and all his witnesses denied the allegation. On the side of the defendant it is significant that this story is not put forward in the reply notice. It is also significant that the bank has at no stage sought to consult the hand-writing expert to support their deductions. In fact from the very beginning by sending Bijoor to the Police station the bank has been proceeding on the assumption that the cheque was a forgery. The Police investigation also was on the foot that the cheque was forged and not that it was a blank cheque signed by the plaintiff with the amount filled in later. I have already pointed out under point No. 1, that there can be no doubt that in this case the signatures of Abbu Chettiar have been forged. The blank cheque theory has therefore got to be rejected.

9. Turning to the clever forgery, there is nothing very clever about it. This Abbu Chettiar prints his letters and his signature in a simple and not a complicated one. Therefore his signature as a matter of fact cries out for passable forgeries. It is only if the signature is carefully compared with the specimen signature, the forgery becomes evident. It is enough to point out the two letters " " in "Appu" and " " in "Chettiar" to establish this conclusion.

In fact it is not the case for the bank that the-forgery is so clever that they could not detect any difference between the signatures in the cheque-and the specimen signature of Abbu Chettiar which is in the Bank for the purpose of comparison before a cheque is passed. The person who has got to do this comparing and certify and on the strength of which the manager passes the. cheque, viz., the accountant Bijoor agrees that he detected these differences at the time of the passing of the cheque and certified because he considered that as the specimen signature was. taken three years prior, these changes must have been due to passage of time affecting the physical movements of the maker of the signature. On the other hand, it is clear that notwithstanding, these differences this accountant passed the cheque because he is found to be nothing more than what he impressed me in the box as a vain coxcomb, whose professional ability is in inverse-proportion to his pretensions.

This Bijoor's mother tongue is Canarese and he does not know a single letter of the Tamil alphabet. Ke has been attending to this work in this Bank for only a few months and yet he pretends to have made such a study of Tamil signatures, that he could not only detect differences but he is in a position even to assign reasons for such discrepancies and resolve the natural doubts arising therefrom. In fact I have my own serious doubts whether this Bijoor even made a careful comparison with the specimen signature of Abbu Chettiar before certifying. In any event, when a bank employs such a person and on the foot of whose certification they pass cheques, they must be held to be grossly negligent of their obvious duty to see that the signatures found on the cheque are those of their customers.

In regard to endorsement in foreign characters, as is the case of Tamil so far as

this Hyderabad State Bank is concerned, where the Manager seems to be a Telugu gentleman having no knowledge of Tamil and the cashier on whose certification the Manager has to pass the cheque is a Canarese gentleman who does not know the Tamil Characters, as Buckley L. J. said in -- "Carlisle and Cumberland Banking Co. v. Bragg", (1911) 1 KB 489 (B) :

"If a document were presented to me written, in Hebrew or Syriac, I should for the purposes of that document be both blind and illiterate, blind in the sense that, although I saw some marks on the paper, they conveyed no meaning to my mind, and illiterate as regards the particular document, because I could not read it."

Therefore it is pointed out in Paget's Law of Banking, 5th Edn. page 203,

"Unless the banker has personal knowledge of the particular language, it would seem doubtful whether the mere position on the cheque of hieroglyphics conveying nothing to his mind brings the case within Sec. 60. The "good faith" has no intelligent basis, the characters scarcely "purport" anything to one to whom they convey no meaning and "the ordinary course of business" would suggest verification."

Therefore, in this case Bijoor was both blind and illiterate in regard to the signatures in this cheque and has not adopted the ordinary course of business of suggesting verification to the Manager.

As H. P. Sheldon in Practice and Law of Banking, 6th Edn. page 3, points out "If the banker has reason to doubt the genuineness of a signature he should to protect himself either get it confirmed or return the cheque marking it "signature differs". Therefore, neither the signature of Abbu Chettiar on the cheque is genuine nor has the bank made the payment for the cheque in Question in perfect good faith and without any negligence whatever after having reasonably satisfied themselves regarding the signature in the cheque apart from the fact that if the drawer's cheque is forged or unauthorised, however clever the forgery, the banker cannot debit his customer's account in case he pays the same (S. R. Davar Law and Practice of Banking, page 31).

10. Therefore, the true principle applicable to cases of this nature is that the banker cannot charge his customer with any money with which he has parted without the customer's authority. If the customer says "pay bearer" and the banker pays the bearer that is an act of payment as against the customer though the bearer was not himself entitled to receive the money. But where the customer's signature as drawer is forged, the banker is not so protected because a document purporting to be a cheque but to which the drawer's signature is forged, is not a cheque at all, and is not drawn on a banker; -- "Imperial Bank of Canada v. Bank of Hamilton", 1903 AC 49 (C); -- "Bank of England v. Vagliano Bros.", 1891 AC 107 (D); -- "Orr v. Union Bank of Scotland", (1854) 1 Macq 513 (E).

The foundation of the protection of the banker against forged indorsement has been frequently stated to be the impossibility of his knowing the signatures of all persons indorsing the order cheques drawn by his customer. Often this statement occurs in contrast to one to the effect that a banker is or ought to make himself acquainted with the signatures of his own customers and detect any imitation: -- "Charles v. Blackwell", (1877) 2 CPD 151 (F). If this implies legal obligation, it would afford another reason why the banker should not be protected against forgery of his customer's signature.

Later cases as pointed out in Grant's Law of Banking, Vol. I, page 24, expose the fallacy of there being any such legal duty, or deception of the banker by a cunning forgery being a breach of it or constituting negligence, and leave the banker's inability to charge his customer on the true ground of payment without authority: See the catena of decisions cited at page 23 Grant's Law of Banking, Vol. I, page 24, -- "London and River Plate Bank v. Bank of Liverpool", (1896) 1 QB 7 (G); -- "Bale v. Parr's Bank", (1909) 25 TLR 549 (H) etc.

In short, to cite Halsbury's Laws of England (Simond's Edn.), Volume 2, page 204, "A document in a cheque form to which the customer's name as drawer is forged or placed thereon without authority is not a cheque, but a mere nullity. Unless the banker can establish adoption or estoppel, he cannot debit the customer with any payment made on such document." If the signature of the drawer is forged and the banker pays out the customer's money on the authority of the forged signature the banker cannot usually debit his customer with the money paid out. The mandate on which the banker has acted is not his customer's mandate. H. P. Sheldon Practice and Law of Banking, 6th Edn., page 66.

"A cheque bearing a forged signature is not the order of the customer and he cannot normally be charged with any amount paid in respect of it." If in the circumstances for particular case he is to be charged therewith, it must be on a ground apart from the document itself such as estoppel by negligent conduct or ratification" (Hart Law of Banking, Volume I, p. 374, 6th Edn).

11. The mutual duties and obligations of a banker and customer, so far as the passing of a forged cheque is concerned, are rested in India on the well-known relationship of agent and principal. This relationship requires that the agent banker is bound in making payments to bring to bear upon his task the skill and prudence required in the ordinary course of business like being able to identify the signature of the customer and detect imitations and must make the payments in good faith and without negligence and which in each case is a question of fact: -- "Ewing & Co. v. Dominion Bank". 1904 AC 8 (I). Otherwise a payment made without good faith and in negligence is not a due payment within Section 10 of the Negotiable Instruments Act. AIR 1944 17 (Nagpur) In such cases the customer will be entitled to recover the amount of the forged cheque from the banker.

On the other hand, there is a corresponding obligation on the part of the customer not to be negligent or disregard ordinary precautions for the reasonable protection of the banker against injury because where the customer's neglect of due precautions has caused his bankers to make a payment on a forged order, the customer can-not set up against the banker the invalidity of a document, which he has induced them to act on as genuine. But apart from adoption or ratification it is not easy to define where estoppel by negligent conduct as to the actual forgery of customer's signature to the cheque comes in, even on the present basis of the customer's duty. Mere carelessness in keeping the cheque book is, of course of no use: --" AIR 1944 17 (Nagpur) "; -- L. Pirbhu Dayal Vs. The Jwala Bank, . In fact, it is generally adduced as the "reductio ad absurdum" of the contentions as to estoppel by negligence: -- "Scholfield v. Londesborough", (1896) AC 514 (per Lord Halsbury) (L) The lack of supervision over an agent, who might have access to the cheque book and opportunities for concealing forgeries committed by him, is probably too remote in this connection: -- "1891 AC 107 (D)" and -- "Farquharson Eros, and Co. v. King & Co.", 1902 AC 325 (M). In other words, as has been frequently laid down by Courts in order to make the customer liable for the loss the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss: -- "Lewes Sanitary Steam Laundry Co. Ltd. v. Barclay Bevan and Co.", 1906 11 Com Cas 255 (N). Per Kennedy J.; -- "Ahmad Moolla Dawood v. S. R. M. M. C. T. Pereinan Chetty firm", AIR 1924 Rang 264 (O).

The negligence on the part of the customer spoken of by Lord Selborne must, however, be understood as limited to negligence directly leading to the loss, or enabling it in the legal sense of the phrase, to be committed: -- "1902 AC 325 (M) -and -- "1391 AC 107 (D)". What particular act or line of conduct precludes the drawer from denying the banker's right to debit him with a forged cheque is a question of fact (Sheldon Ibid p. 66). To sum up this discussion in the words of Scrutton L. J. in Appeal Case, -- "Greenwood v. Martins Bank Ltd.", (1932) 1 KB 371 (P), wherein reference was made to -- "London Joint Stock Bank Ltd. v. Macmillan and Arthur", 1918 AC 777 (Q), there is a continuing duty on either side to act with reasonable care to ensure the proper working of the account.

12. The foregoing discussion can be summarised in the following live propositions: (i) It is for the customer to establish affirmatively that the signature on the disputed cheque is not that of the customer but a forgery- (H) If the drawer's cheque is forged or unauthorised, however clever the for" gery is, the banker cannot debit his customer's account in case he pays the sum unless he establishes adoption or estoppel, (iii) What amounts to adoption or estoppel is dependent upon the circumstances of each case, (ivt In order to make the customer liable for the loss the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss, (v) The Banker cannot set up either estoppel or adoption if his own conduct or negligence has occasioned or contributed to the loss, the well-settled

principle being that where one of two innocent parties must suffer for the fraud of a third, that party should suffer whose negligence facilitated the fraud.

13. It follows, applying these principles, that in this case the banker having paid a cheque not drawn on the banker at all, the plaintiff is entitled to the reliefs asked for. The plaintiff on the one hand has established that the cheque is a forgery and that the banker has not brought to bear upon his task in making payment the skill and prudence required of him in the ordinary course of business to be able to identify the signature of the customer and detect imitations and secondly, the banker has not made the payment in good faith and without negligence. On the other hand the defendant banker has failed to establish that the payment of the cheque was due to the negligent disregard of ordinary precautions for the reasonable protection of the banker against injury by the customer. In other words, neither estoppel has been shown nor adoption has been set up in this case and which I need not add cannot be set up by the Banker whose own conduct or negligence has occasioned or contributed to the loss. It is well settled in such circumstances that where one of two innocent parties must suffer for the fraud of third that party should suffer whose negligence facilitated the fraud: -- "Punjab National Bank v. Mercantile Bank of India Ltd.", 36 Bom 455 (R). (Scott and Batchelor JJ.).

14. I find under issue 1 that the signatures of the plaintiff in the cheque in question are forgeries; under item 2 that the plaintiff has not been shown to have failed in any of his duties to the defendant bank and that the circumstances set out in paragraph 7 of the written statement have not been made out; under issue 3 that the plaintiff is not entitled to the damages claimed as no evidence relating thereto was adduced before me and I have no materials to assess the damages and as a fact I find that the damages claimed have not been proved; and under issue 4 that the plaintiff is entitled to relief under Clauses (a) and (d) of the relief column in the plaint.

15. The suit is accordingly decreed for plaintiff with costs.

16. Before parting with this case I want to make it clear that the negligence of the banker in this case was the negligence of Bijoor and not of the Manager, Subba Rao.