
(1992) 03 CAL CK 0016
In the Calcutta High Court
Case No : Suit No. 28 of 1984

Mahabir Prasad Bubna

APPELLANT

Vs

United Bank of India

RESPONDENT

Date of Decision : 12-03-1992

Acts Referred:

Contract Act, 1872 — Section 73
Evidence Act, 1872 — Section 23, 31
Negotiable Instruments Act, 1881 (NI) — Section 58, 6, 85

Citation : AIR 1992 Cal 270

Hon'ble Judges : Ajoy Nath Ray, J

Bench : Single Bench

Advocate : Pratap Chatterjee and Utpal Bose, for the Appellant; Ajay Chatterjee, for the Respondent

Judgement

1. In this suit the plaintiff has claimed for a decree for Rs. 1,56,000/-and odd and return for certain securities pledged with the Bank.
2. By reason of an interlocutory order the sum of Rs. 6000/- and odd and the securities claimed have been returned by the defendant Bank to the plaintiff and as such the suit survives only to the extent of the sum of Rs. 1,50,000/- and interest thereupon pendent lite and upon judgment. The Bank has not disputed about the return of the sum of money of Rs. 6310.40 or the return of securities, or that the same should in any manner be altered by this decree, and as such the said returns are declared to have been done appropriately.
3. The plaintiff had a long standing account with the Give Row Branch of the defendant bank i.e. United Bank of India and the suit arose out of two cheques both bearing date 4th November, 1982. The cheques were on their faces drawn as self-bearer cheques for the respective sums of Rs. 70,000/- and Rs. 80,000/-.
4. The plaintiff admittedly carried on and carries on business under the name and style of M/s. M. Prasad & Company. The cheques bore the rubber stamp of the said business name and also bore the signature which ran as "M. Bubna."

5. The plaintiff has disputed the signatures appearing on these two cheques.

6. Exbt. A in this suit is composed of four documents which are the admitted account opening form signed by the plaintiff with the business name on the rubber stamp, the specimen signature card admittedly signed by the plaintiff, and the two disputed cheques.

7. The bank said as follows in paragraph 20 of the written statement which is reproduced below in its entirety:

"Each and every allegation and submission made in para 12 of the plaint is incorrect and is denied and disputed as if they were set out hereinafter and traversed specifically. The defendant states that the statement of account have been furnished in due time and denies that the defendant wrongfully declined to pay to the plaintiff his dues or the credit balance as alleged or at all. All sums payable to the plaintiff have been duly paid without prejudice to any of the contentions aforesaid and/or in the alternative the defendant states that the plaintiff was negligent in leaving his concerned cheque books in an insecured place by reason whereof its employee one Bothra used the said cheque and withdrew the said sum of Rs. 70,000/- & Rs. 80,000/- from the said account of the plaintiff. In the premises the defendant is not liable at all."

8. In the trial before this Court, the plaintiff called two witnesses, the first being a hand-writing expert and the second being the plaintiff himself. The bank called one witness namely Tapap Kr. Basu. It was the purpose of the plaintiff to prove that he had not signed the two disputed cheques and it was the purpose of the bank to disprove that, and further to prove that the two cheques were utilised from a cheque book issued in the regular course of the bank's business and that the payment of the two self-bearer cheques also took place in the normal course after issuance of a token and after verification of the signatures. The parties went to trial upon the following five issues :

"1. Were the signature of the plaintiff forged on cheque Nos. CLR/169903 and 769905 both dated 4-11-1982 both on the obverse and reverse as pleaded in para 8 of the plaint?

2. Were the cheque foils never issued by the defendant to the plaintiff as alleged in para 8 of the plaint?

3. Were the cheques allegedly forged/fabricated passed for payment and/or allowed to be encashed by the defendant without due care or attention with which the same should have been dealt with in the usual course of the defendant's duties and obligations as a banker owed to its constituent as alleged in paragraph 10 of the plaint?

4. Was the plaintiff negligent in keeping the concerned cheque books by reasons of which the plaintiffs employees used the cheques and withdrew the amount of Rs.70,000/- and Rs. 80,000/- from the account of the plaintiff as alleged in paragraph 20 of the written statement?

5. To what reliefs, if any, is the plaintiff is -entitled?"

9. The first issue is the most important. The issue must be clearly comprehended. The issue is not whether the two disputed cheques were forged well or forged badly, but the issue is whether the two disputed cheques were signed by the plaintiff himself.

10. If this is clearly understood, then the question of the evidence of the handwriting expert would lose much of its importance, though it might not lose all its importance. If the handwriting-expert is able to convince that the signature is manifestly different from the signature of the plaintiff then the issue No. 1 could be answered in favour of the plaintiff there and then. But in case the signature bears some resemblance or similarity to the admitted signature of the plaintiff then the question would remain as to whether it was the plaintiff himself who signed or whether it was somebody else who signed similarly like the plaintiff.

11. I have examined the signatures on the disputed cheques both on the obverse and the reverse. I have also examined the rubber stamp. It does appear to me that the rubber stamp marks are similar on the two disputed cheques, as on the account opening form.

12. Nor does it appear to me that the signatures on the two disputed cheques are manifestly different in appearance from the admitted signatures of the plaintiff appearing on several cheques in Exbt. "C" series or in the admitted signatures in the other two documents of the Ext. "A".

13. During the cross-examination Mr. A. Chatterjee adopted the understandable method of showing the plaintiff the signature portion with the rest of the cheques covered, some cheques were shown which had the admitted signatures of the plaintiff and the" two disputed cheques were interposed during such showing of cheques to the plaintiff. The result of this would be found, amongst others, from the answers to questions 9 and 10 in the examination in chief and questions 66 and 70 in the cross examination. Briefly put, the plaintiff stated from the box, while seeing only the signature portion, that the signature on the disputed cheques also either appeared to be his signature or was his signature.

14. The aforesaid admission does not conclude the controversy as to issue No. 1, as was, with respect, wrongly sought to be submitted by Mr. A. Chatterjee. On a combined reading of S. 23 and 31 of the Evidence Act, it is clear that the admission as to the signature of the plaintiff with regard to the two disputed cheques is both relevant and inconclusive. It is not at all unreasonable for a person to be deceived by a forgery of his own signature and to say that the signatures are actually his own. That would only settle an issue of the excellence of the forgery, the point as to whether M. Bubna himself signed the two cheques is different from the point as to how well the signatures appearing on these two cheques resembled the actual signature of M. Bubna.

15. I am unable to believe on a total view of this case that M. Bubna an established businessman, actually signed the two disputed cheques, and after the money being paid out, thereupon denied falsely that he signed these two cheques. The doing of business of Bubna all along and even until now was not in any serious dispute. If the issuance of cheque books has any connection with the volume of the business run by Bubna, then it was large business indeed. In Exbt. 7 series it appears that the bank has issued on a single day 500 cheque leaves to M. Bubna in the shape of five separate cheque books.

16. One of the Judge's brief of documents prepared by the plaintiff was exhibited by consent and that is Exbt. B. Almost immediately upon the detection of the payments out of the two cheques, the plaintiff complained to the Officer-in-Charge, Hare Street Police Station and directed the letter dated 13th November, 1982 to be treated as an F.I.R. lodged with the police authorities. The copy of that letter is part of Ext. B. If Bubna did not sign the cheques, he was denying (sic) his signatures falsely, and was asking for an investigation of his own crime by the police authorities. This does not appear to me to be at all plausible.

17. Bubna answered to question No. 28 that one of his employees was Vikam Chand Bothra. In the written statement of Bank in the paragraph quoted above this name "Bothra" appears in the alternative case run by the bank, that even if the signature had been put by Bothra and not by plaintiff himself the bank should be relieved from responsibility.

18. It is well known in law that upon facts an alternative case cannot be run. A person facing the trial has to take a definite stand. The defendant's stand before me during the trial of suit was that it was Bubna and Bubna himself who had signed the two disputed cheques. To put it mildly, such a stand conflicts starkly with the case on facts pleaded in paragraph 20 of the written statement, although the said pleading was sought to be put in the alternative.

19. " The demeanour of the plaintiff from the box was sufficiently convincing, though he was not very well, and had to answer questions from a chair because he was submitted to be suffering from a heart ailment. He gave fair and frank answers to all the questions put whether in the chief or during the cross-examination. In my opinion, in the above circumstances of this case, it would be an error to disbelieve the businessman in regard to the two cheques whereupon he disputes that he has put the signature. It would be disproportionate both to his volume of business and his long repudiation suddenly to try and spoil everything by trying to defraud the bank of rupees 1,50,000/- by drawing the two self bearer cheques and denying the same immediately thereafter. There was no evidence about his being suddenly short of money or there being any other necessity for drawing a self-bearer cheque. It was admitted by the bank that though the self-bearer cheques were drawn on certain Occasions by the plaintiff yet those were rare occasions. If this were a criminal case, it would be an appropriate occasion to say that the plaintiff is not guilty of falsely denying his two cheques because he wholly lacks any motive therefor.

20. Under these circumstances Issue No. 1 is answered in favour of the plaintiff.

21. With regard to Issue Nos. 2 and 3, the defendant produced several documents including the Cheque Issuance Register and the Token Register. These were proved to be genuine documents by the only witness who came to the Box on behalf of the bank. In two places in Ext. 7 series the said witness identified the signatures to be his own. These were the portions marked Ext. 7(b) and Ext. 7(d).

22. The two disputed cheques came from the book which was issued on the 22nd October, 1982 and in that respect the issuing entry in the Cheque Issuance Register is marked Ext. 7(h). Regarding the other cheque issuance entries to M. Prasad & Co., there was not much dispute raised. From an examination of those other entries, it is found, say for example, in Ext. 7(a), that these cheque books were issued under the signature of an employee who signed apparently as R. Singh. Such an employee by the surname of Singh has also been mentioned by the plaintiff in answer to question No. 28. It appears however that the important entry of Ext. 7(h) is signed on the receipt column by one R. Gupta. The signature is bold and clear but is not to be found on any of the other dates where other cheque books had been issued to the plaintiff. It is not possible upon the evidence tendered before me to state clearly that the person who signed as R. Gupta and obtained the cheque book which contained the two disputed cheque leaves was definitely an employee of the plaintiff. However, the possibility is not to be ruled out in the least. On the other hand, looking at the regular manner in which the bank issued the cheque books from time to time, it appears to be more than probable that some employee of the plaintiff, might well be Bothra, utilised some documents of the plaintiff himself to obtain an unauthorised issuance of the cheque book from the bank.

23. Proceeding upon the balance of probabilities, I would answer Issue No. 2 in favour of the bank with only one reservation. It has not been proved fully that the person who signed as R. Gupta was an employee of the plaintiff, nor has it been proved that R. Gupta or the person who signed as R. Gupta had the authority to receive the cheque book on behalf of the plaintiff. As such issue No. 2 should be taken as answered in favour of the defendant to this extent that the bank issued the book of cheque counter-foils to a person without having any reasonable cause to believe or suspect that that person was not duly authorised to receive the cheque book on the part of the plaintiff.

24. It is significant that the plaintiff has not produced any unused cheque book issuance slip which is customarily enclosed with the previously issued cheque book. On the other hand the bank has also not produced any such slip on the basis of which the cheque book was issued on 22nd October, 1982. The fraud occurred on 4th November, 1982 and the complaint to the police authorities was made by 13th November, 1982. It was well known to the bank (that dispute has arisen. If any cheque issuance slip had been with the bank in respect of the book issued on 22nd October, 1982, the same should have been preserved and

produced at trial. The same not having been done, there is some slight flaw in the case of the bank regarding regular issuance of the cheque books but the flaw, to my mind, is sufficiently compensated by the plaintiff not producing any unused cheque issuance slip. In a case of a civil nature such balancing of fault is unavoidable for arriving at a conclusion which appears to be the most in accordance with the balance of probabilities.

25. Issue No. 3 is answered in favour of the defendant to this extent that the payment of the two self bearer cheques appear on the evidence before me to have been made in the regular course of the bank's duties. Three signatures of three persons including that of the Manager of the Branch have been proved by the bank's witness. However, the witness himself had nothing to do with the paying out of these two cheques. Very truthfully the said witness confessed that the volume of business does not call for or permit too exact a checking of the signature on the cheque with the signatures in possession of the Bank. I have also said that the signatures on the two disputed cheques are not utterly dissimilar to the admitted signature of Mahabir Prasad Bubna. That the signatures are somewhat similar, is proved satisfactorily by Bubna himself being confused into admitting the signatures on the disputed cheques to be his own. Under these circumstances it is impossible to hold that the bank officials were in any manner negligent in passing the cheques or accepting the signatures thereon as the apparently genuine signature of Bubna.

26. Issue No. 4 and Issue No. 5 must be taken up together. On the basis of the above answering of Issue Nos. 2 and 3, it would be for the plaintiff to disprove negligence with regard to the cheque book and the two disputed leaves contained in that cheque book, in an appropriately constituted action where such disproving is called for. It is a logical conclusion from the aforesaid discussion of Issue Nos. 2 and 3 that the plaintiff or an employee of the plaintiff or some other person somehow connected with the plaintiff either on his own or as an employee of the plaintiff got hold of documents wherefrom he could obtain issuance of the cheque book as well as put signatures upon two disputed cheques along with the rubber stamp of the plaintiff that bore a deceptive similarity to the genuine cheques issued by the plaintiff. The law in this regard is to be discussed at this stage.

27. When a person keeps money with the bank, it is the law of contract in India as between the Banker and the Customer that the bank shall pay out money from the credit of the account upon instruction given by the account holder in that regard. Such instruction takes usually the form of a duly signed cheque. A banker is bound to honour the cheque duly signed by its customer. Similarly, the bank is bound, according to the strict terms of the law of contract, not to honour any cheque which is not signed by its customer. It would be no defence for the Bank to say that a cheque leaf was negligently allowed to be used by the customer and as such the money was paid out. If the cheque leaf has not been signed by the customer with the intention of charging the Bank to pay, or,

sending a mandate to the Bank to pay, then the Bank has no authority to pay.

28. Paragraph 27 of the case of Canara Bank Vs. Canara Sales Corporation and Others, is, to my mind, a good authority for the above proposition. The said paragraph is set out below:

"The principle so settled by the House of Lords was pressed into service before this Court in the above case. This Court held the principle settled by the House of Lords could not help the bank. The accepted principle that if the signature on the cheque is genuine, there is a mandate by the customer to the bank to pay was reiterated. It was also held that if an unauthorised person got hold of such a cheque and encashed it, the bank might have had a good defence, but, however, if the signatures on the cheque or at least one of the signatures are or is not genuine, there is no mandate on the bank to pay and the question of any negligence on the part of the customer, such as leaving the cheque book carelessly so that a third party could easily get hold of it would afford no defence to the bank. This Court distinguished Mecomillan's case, observing that if any of the signatures was forged the question of negligence of the customer in between the signature and the presentation of the cheque never arose. The suit was however, dismissed on another point and that of jurisdiction."

29. In the said Supreme Court case Canara Bank Vs. Canara Sales Corporation and Others, the learned Judge approved the dicta contained in the case of Macmillan, reported in 1918 AC 777 . Portions from the judgment of the House of Lords are extracted by the Supreme Court and the portion appearing at the end of paragraph 26 is reproduced below :

"If the customer chooses to dispense with ordinary precautions because he had complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results. No one can be certain or preventing forgery, but is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. If owing to the neglect of such precautions it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker".

30. The Supreme Court also quoted with approval the advising opinion of the Judicial Committee in the case of Tai Hing Cotton Mills, reported in (1985) 2 All ER 947. Paragraph 40 appearing in the Supreme Court Judgment is in this regard reproduced below :--

"Their Lordships of the Privy Council summed up the Law as follows :

Their Lordships do not, therefore, embark on an investigation whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by one to the other. Their Lordships do not, however, accept that the parties mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than

that recognised in Macmillan and Greenwood can be implied into the banking contract in the absence of express term to that effect, the respondent banks cannot rely on the law of tort to provide them with greater protection than that for which they have contract".

31. In Paragraph 42, the learned Judges of the Supreme Court said that their Lordships were adopting the reasoning indicated above. With great respect, to my mind, a combined reading of paragraphs 26, 32, 40 and 42 in the case of Canara Bank leave no manner of doubt that it was approved by the Supreme Court to this effect that if owing to the neglect or precautions not taken by a customer of a banker, the dishonest person is permitted to tamper with a cheque then the customer must bear the loss as between himself and the banker.

32. It is also however an undeniable proposition laid down by the Supreme Court that (see paragraph 27 of the above judgment) if a cheque book is carelessly left by a customer and the third party utilised it for obtaining payment from the bank, the bank could not put this in a defence to an action for a liquidated claim whereby the bank was called upon to return the money paid out upon cheques which did not contain the true mandate of the customer.

33. With the utmost respect, I venture to suggest that a true reconciliation of these two propositions approved and laid down by the Supreme Court would lie in this, that though a bank cannot take a simple defence of customer's negligence in a claim where a cheque not signed by the customer has been paid out, yet the banker would be permitted in an appropriately framed action in tort to claim for loss or damage suffered by it by reason of the negligence of its customer. With the greatest respect, in view of the above findings of the Supreme Court, the portion of the opinion of the judicial Committee which is set out in paragraph 29 of the Canara Bank's case, needs a rider.

34. The judicial committee pronounced in that paragraph that in the matter of resolution of disputes as between a banker and its customer it would cause confusion to look to liabilities and rights both in the field of the law of contract as well as in the field of the law of tort. To my mind, the law of contract can either afford or not afford a complete defence to a bank when a case of wrong payment is made out. If the bank has paid in accordance with the contractual mandate then the bank cannot be liable on contract. If, however, the bank has not paid in accordance with the contractual mandate, then the bank is liable on contract; notwithstanding the issues on (of) negligence or carelessness, the bank cannot plead such negligence or carelessness in defence.

35. An action in tort by the bank would however raise substantially different issues. A claim for negligence in respect of -- say cheques totalling Rs. 1,50,000/- which have been paid out by the bank would not necessarily result in assessment of damages either for Rs. 1,50,000/- fully or an assessment of nil damages. On the basis of the principles of apportionment of liability and the principles relating to contributory negligence, it might well be that the bank's

claim for loss suffered due to carelessness of a customer would, upon a full scale hearing and analysis result in damages coming to 50% or 60% of the total money paid out by the bank. Such apportionment of liability could not be easily or appropriately made upon the cut and dried principles which generally determine liabilities according to the law of contract. It is possible theoretically to achieve the same result by assessment of damages by taking into account the negligence of the customer as a breach of the customer's contract. To my mind that would not change the picture substantially, because one would be applying rather the principle of apportionment of liability on contributory negligence rather than any classical principle of assessment of damages on a breach of contract.

36. The above discussion of law is, to my mind, vitally important, because certain aspects of negligence were gone into at the trial of this suit. The defendant however has no counter claim. The defendant has not filed a cross suit either. There was no notice to the plaintiff that in case the plaintiff failed to prove due care it might suffer a decree upon an action constituted upon negligence. Under these circumstances, it would be impossible in law and unfair to the plaintiff on facts to treat paragraph 20 of the written statement as a counter-claim or a plaint by the defendant bank as against the plaintiff. The question of assessment of damages for negligence or apportionment of damages for negligence never arose. The bank merely pleaded the plaintiff's negligence in defence in paragraph 20 of the Written Statement, and that the defendant is not permitted to do in view of the Supreme Court judgment quoted above. Even in spite of the aforesaid decision of the highest authority, in the manner, I venture most respectfully to read the same, it would still be open to the defendant to make a cross claim or to make a counter-claim for negligence without merely pleading the customer's default in defence. But that not having been done, the defendant is unable to resist relief in favour of the plaintiff even though the plaintiff has been proved to have been somewhat negligent in the manner of the conduct of his business so as to have permitted the issuance of the fateful cheque-book by the bank and the subsequent utilisation of two of the leaves contained therein.

37. The principal claim of the plaintiff must therefore succeed.

38. Before me the case has been conducted fairly by both parties without any attempts at hiding any evidence. The bank has also been able to prove due care in the conduct of its business and the payment out of the cheques. By reason of the interlocutory orders which were not challenged either previously or before me the bank has submitted to the fair procedure of return of the money and securities which were not the true subject matter of dispute in this suit. The bank has not been in any manner dilatory or negligent in the matter of the conduct of the suit and Mr. A. Chatterjee undertook extreme pains to continue with the suit in spite of certain personal difficulties. The bank's general treatment of its customer, being the plaintiff, has not been in any manner unbusiness like. Under these circumstances it would be unfair to award any but almost nominal interest

during the time the suit has been pending disposal. By reason of the same, any but almost nominal further interest would also be inappropriate. There shall accordingly be a decree for Rs. 1.50 lakhs. Interim interest and further interest thereon at the respective rates of one per cent, per annum and 1/2 percent, per annum. There will be no order for costs in case the bank pays the decreed claim within a period of 3 months from date hereof; in default of which, the plaintiff shall be entitled to costs of Rs. 10,000/- as the assessed costs of this suit. There shall be no separate order on the application initiated by the petition verified by the affidavit of Rajendra Prasad Bubna on 29-2-92.

39. Parties may act upon the copy minutes portion of this judgment and decree.

40. Stay of operation of the decree is prayed for, but the same is refused.

41. Order accordingly.