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**(1971) 11 MAD CK 0045**

**In the Madras High Court**

**Case No : O.S. App. No. 52 of 1964 (Pauper)**

N. Mohamed Hussain

APPELLANT

Vs

The Chartered Bank, Madras and Another

RESPONDENT

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**Date of Decision : 03-11-1971**

**Acts Referred:**

Transfer of Property Act, 1882 — Section 78, 79, 80

**Citation : AIR 1972 Mad 275 : (1972) 85 LW 246**

**Hon'ble Judges : K. Veeraswami, C.J;Raghavan, J**

**Bench : Division Bench**

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## **Judgement**

Raghavan, J.—The plaintiff is the appellant. The appeal arises out of a suit for recovery of Rupees twelve lakhs as damages for the alleged loss sustained by the plaintiff in his business, social position, credit and reputation by reason of the wrongful action of the first defendant in dishonouring the cheques drawn by him on the first defendant-Bank. The case of the plaintiff is that he was a leading merchant in hides and skins in Madras with an average annual turnover of nearly five lakhs of rupees, that he possessed a very valuable, well-mechanised tannery at Vaniyambadi, that he had built up a reputation for his goods both in Indian and abroad, that he was a customer of the first defendant-bank with whom he had an overdraft account, that an amount of ₹13,599-8s. was lying to his credit in the first defendant's head office in London, that in or about February 1948, the plaintiff requested the first defendant to get back the said amount from the head office at London to its branch office at Karachi, that he was desirous of purchasing hides and skins at Karachi where at that time they were selling at a rate much lower than that prevailing in Madras, that in view of the difficulty in transacting the business at Karachi the plaintiff instructed the first defendant to get back the money from Karachi and credit the same to his account at Madras, that the first defendant instead of transferring the said amount from Karachi to Madras, kept the same under fixed deposit, that the first defendant's branch at Karachi was keeping the deposit letter with them that as the plaintiff's business was going on well and the first defendant was co-operating with the plaintiff, the

plaintiff did not press for the transfer of the moneys from Karachi branch to the Madras branch of the first defendant Bank, but believed in the first defendant's representation of certain difficulties in having the amount transferred, that in 1955 the first defendant agreed to give an overdraft for the plaintiff's business to the extent of 31/2 lakhs of rupees on the plaintiff's Immovable properties and that in pursuance of the said agreement the title deeds of the Immovable properties of the plaintiff were deposited with the first defendant, that subsequently on 26-11-1956 the first defendant agreed to give a further overdraft of Rs. 21/2 lakhs on the security of the plaintiff's existing and future stock-in-trade consisting of hides and skins and machinery, that the plaintiff operated on the overdraft account in pursuance of the aforesaid agreements and the overdrawing in the said account was below the agreed limit of six lakhs of rupees; that late in 1957 and early in 1958 the first defendant in breach of the aforesaid agreement commenced dishonouring the cheques drawn by the plaintiff on the said overdraft account without any notice to the plaintiff, that at the time when the first defendant started dishonouring the plaintiff's cheques, the first defendant had a sum of nearly two lakhs of rupees under its control in its branch at Karachi, that even when the account has not reached the agreed limits the first defendant wrongfully dishonoured the plaintiff's cheques and that in so doing the first defendant committed breach of the agreement with the plaintiff, that by reason of the dishonouring of the cheques drawn by the plaintiff grievous injury resulted to the plaintiff's reputation and trade, that the first defendant neglected to get the amount standing to his credit in Karachi branch of the first defendant transferred, that the action of the first defendant resulted in the crash of the business of the plaintiff and led to his insolvency. The plaintiff, therefore, estimated the damages suffered by him at twelve lakhs of rupees from the first defendant.

2. The first defendant filed a written statement denying every one of the allegations made in the plaint. The first defendant denied that they ever acted as the agent of the plaintiff in respect of the amount transferred to the Karachi branch of the first defendant-bank from its Head Office at London, that it merely obliged the plaintiff to open the current account at the Karachi branch, that the current account only at the request of the plaintiff and that the request for re-transfer of the amount to the Madras branch was made only in June, 1958. The first defendant's main defence is that they allowed overdraft facility only to the extent of Rs. 2,50,000 though the limit was mentioned as Rs. 3,50,000, with the additional facility of Rs. one lakh given to the plaintiff on the security of the Immovable property which facility was withdrawn by the first defendant and the overdraft was reduced to Rs. 2,50,000, that the cheques dishonoured exceeded the limit of Rs. 2,50,000 and consequently no amount could be claimed by way of damages for dishonouring the cheques in excess of the said limit. The first defendant further denied that the insolvency of the plaintiff was due to any wrongful act on their part and that the plaintiff is not entitled to any damages for the loss of reputation etc. as they acted strictly in accordance with their

obligation under the overdraft agreement and that the plaintiff is not entitled to any of the reliefs claimed.

3. The trial Judge recorded the statement that the learned advocate for the plaintiff mainly argued the case only on the footing that the overdraft was for Rs. 3,50,000 and not Rs. 6,00,000, as pleaded in the plaint. The trial Judge rejected the plaintiff's contention that the overdraft limit was Rs. 3,50,000, but held that the overdraft granted to the plaintiff was limited to Rs. 2,50,000, on the security of the plaintiff's existing and future stock-in-trade. The trial Judge also further found that the dishonour of the plaintiff's cheques by the first defendant-Bank was on account of the plaintiff's exceeding his overdraft limit of Rs. 2,50,000 during the relevant period, viz., 1957-58. Regarding the fixed deposit at Karachi the learned Judge found that the plaintiff would not on the facts of the case have asked the first defendant to bring the money to Madras till 14-6-1958 and that the first defendant was not guilty of negligence in not repatriating the amount before July, 1959. The learned Judge also found that the first defendant was under no legal obligation to take into account the funds in Karachi while dishonouring the cheques drawn by the plaintiff, that the funds of the plaintiff with the Chartered bank at Karachi cannot be deemed to be available to the plaintiff at any time at Madras. The learned Judge further found that the bankruptcy of the plaintiff was caused due to his own negligence and not to the dishonouring of the cheques by the first defendant-Bank and that the plaintiff is not entitled to claim damages under any of the heads, namely, loss of reputation, credit and social position. In the result, the suit was dismissed. The plaintiff filed O. S. Ap. No. 52 of 1964 to this court.

4. the main question for determination in this appeal is whether the first defendant gave overdraft facilities to the plaintiff to the limit of Rs. 3,50,000 or Rs. 2,50,000 on the hypothecation in favour of the first defendant on the security of the stock-in-trade present and future consisting of hides and skins and other merchandise and stored or being stored from time to time at any premises, warehouse, godown, jaitha, tannery or any other place of storage whatsoever and at No. 19 Sydenhams Road, Periamet and Tannery at Cutchery Road, Vaniyambadi or wherever else including the goods in transit. The plaintiff was constituent of the first defendant-Bank from 1948. The plaintiff was reputed dealer in tanned hides and skins and he was in the export trade for the said goods from about 1943. The first defendant has at the request of the plaintiff given overdraft facilities to the plaintiff on the security of (a) hypothecation of hides and skins in the Periamet office at Madras and factory at Vaniyambadi; (b) temporary overdraft for discounting bills; and (c) additional overdraft facilities on the deposit of title deeds in respect of Immovable properties as collateral security.

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(After discussing the facts his Lordship proceeded).

It is, thus, seen that at no time the plaintiff complains that the overdraft facilities

granted to him was anything in excess of Rs. 2,50,000. The cheques which were dishonoured were only when the limit was exceeded.

5. As we have observed already, it is the first defendant's reply to the Income Tax Officer, City Circle VI, Madras, dated 3-1-1956 (Ex. D.21) and a similar letter dated 20-12-1958 (Ex.D-104) addressed to the Special Deputy Tahsildar for collection of commercial tax arrears, stating that the plaintiff was granted overdraft facilities upto a maximum of Rs. 3,50,000 that prompted us to investigate into this question whether the overdraft facilities granted to the plaintiff was Rs. 3,50,000 or Rs. 2,50,000. On a scrutiny of the entire documentary evidence we find that the overdraft facilities granted by the first defendant to the plaintiff was only limited to Rs. 2,50,000.

6. In this connection the learned Advocate-General who appeared for the Bank drew our attention to Section 79 of the Transfer of Property Act, which deals with mortgages to secure future advances and their priority over subsequent advances. the illustration to Section 79 brings out the effect of the section. The illustration runs as follows:

"A mortgages Sultanpur to his bankers, B and co., to secure the balance of his account with them to the extent of Rs. 10,000, C having notice of the mortgage to B and Co., and C gives notice to B and co., of the second mortgage. At the date of the second mortgage, the balance due to B and Co, does not exceed Rs. 5000, B and Co., subsequently advance to A sums making the balance of the account against him exceed the sum of Rs. 10,000. B and co. are entitled, to the extent of Rs. 10,000, to priority over C."

The contention of the learned Advocate-General is that this section will be applicable only when a maximum is expressed to secure future advances and it is in that context that Rs. 3,50,000 was expressed by the first defendant bank in their communication to the tax authorities and that the first defendant did not make any wrong disclosure to the tax authorities. In this connection the learned Advocate-General cited the decision of the Privy council in Imperial Bank of India v. U. Rai Gyaw Thu and co. Ltd., ILR 51 Cal 86 : AIR 1923 PC 211. The headnote therein sets out the correct position:

"Where a mortgage made to secure future advances does not express the maximum sum to be secured thereby, the effect of Ss. 79 and 80 of the Transfer of Property Act., 1882, is that the mortgagee does not obtain in respect of an advance subsequently made priority over a mortgage of the same property made before that advance, even if the intermediate mortgagee has notice of the prior mortgage; it is, therefore, not material to consider whether notice is to be imputed to the intermediate mortgagee because he has omitted to inquire for the documents. Section 78 is not applicable as the omission does not induce the making of the further advance.

A mortgage by deposit of documents of title, where validly made, is a "mortgage" in the sense of the Act including Ss. 78, 79, and 80, in India there is

no distinction between a legal and an equitable mortgage."

Lord Dunedin who delivered the judgment on behalf of the board observed at p. 99 as follows:

"It may, however, be not amiss to point out that, in their Lordships' view, the remedy is given in the Act itself, and that is by the insertion in the arrangements for such mortgages of a maximum as indicated by S. 79. The insertion of such a maximum elides the result which otherwise would obtain in terms of the case of *Hopkinson v. Rolt*, 1861 9 HLC 514. It is true that the subsequent mortgage must be made with notice of the prior mortgage which includes the maximum."

Again at page 100 the Noble Law Lord observed as follows:

"But if there had been a maximum then the exception would have applied and the case would have fallen under S. 79..... The Bank who had no maximum expressed so as to get the benefit of S. 79 took the risk of there being an intermediate mortgage. Their further advances could not in any sense be said to have been induced by any action of the respondent."

The facts in *Imperial Bank of India Ltd. Vs. Bengal National Bank Ltd.*, next cited are not of much assistance in considering the present question.

6A. We are, therefore, of opinion that the mention of Rs.3,50,000 being the maximum of the overdraft facilities which the first defendant proposed to give to the plaintiff was in terms of Section 79 of the Transfer of Property Act and this was mentioned in the letters to the Income Tax and Commercial-tax authorities and the said statements cannot be said to be wrong statements on the basis of which the plaintiff will be entitled to claim damages.

7. The learned counsel for the plaintiff-appellant contended that the mention of Rs. 3,50,000 in the said communication to the tax authorities was correct and that was the contract between the parties and that the failure of the first defendant to implement the contract and dishonouring the cheques drawn by the plaintiff which did not exceed the said limit of Rs. 3,50,000 resulted in damages and the present suit for damages is therefore maintainable. In the view that we have taken that the overdraft facilities granted to the plaintiff was only Rs. 2,50,000, and that the plaintiff knew about the same and never raised a protest when the limit was exceeded shows that the first defendant acted properly and acted within their limits in refusing to honour the cheques which exceeded the said limit of Rs. 2,50,000. We hold that the figure of Rs. 3,50,000, mentioned to the Tax authorities were only in terms of S. 79 of the Transfer of Property Act as providing a maximum and there is no obligation on the part of the Bank to advance upto the maximum of limit. The security is only in respect of future advances which may be or may not be made. In the view that we have taken it is unnecessary to consider the question as to the quantum of damages for injury to his credit and reputation which the plaintiff claimed for the alleged breach of its obligation.

8. the learned counsel for the plaintiff-appellant cited the decision of the House of Lords in *Wilson v. United Counties Bank Ltd.*, (1920) 122 LT 76. We do not consider it necessary to pursue this matter. In fact the trial court also has not considered the question of damages and we do not consider it necessary to go into the question.

In the result, the appeal fails and the same is dismissed. On the question of costs we are of opinion that the first defendant is not entitled to their costs both here and before the learned trial Judge for the reason that there is not a single letter intimating the plaintiff that they had exceeded the limit granted by them. It is the duty of the Bank to intimate their constituents when overdraft facility given to the constituents is exceeded to enable them to make arrangements. That the bank in this case has failed to do. We are not satisfied with the reply of the learned Advocate-General that the plaintiff was coming to the bank almost every day and that he knew about the position himself and was orally informed by the authorities. Even if the plaintiff was coming to the bank almost every day it is the duty of the Bank to obtain an acknowledgment from him in writing that he has been informed that the limit granted was exceeded. If the Bank had adopted that course the plaintiff would not have issued further cheques on the bank, without regularising the account. In that view we are of opinion that the first defendant-Bank is not entitled to their costs in this court and before the trial Judge. The appellant will pay the court-fee due to the Government.

9. Appeal dismissed.