
(1962) 02 KL CK 0035

In the High Court Of Kerala

Case No : A.S. No's. 457 and 459 of 1957

Public Bank Ltd., Pudukkad

APPELLANT

Vs

Vilasini Amma

RESPONDENT

Date of Decision : 13-02-1962

Acts Referred:

Citation : (1962) KLJ 446

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : K.K. Mathew and George Vadakkal, for the Appellant; M.K. Narayana Menon and C.S. Narayanan in A.S. No. 457 of 1957 and Respondent 2 in A.S. 459 of 1957 and T.P. Poullose and Annamma Alexander for Respondent 1 in A.S. 459/57, for the Respondent

Judgement

M. Madhavan Nair, J.—These two appeals are by the Public Bank, Ltd., Pudukkad, A. S. No. 457 of 1957 as the defendant in O. S. No. 177 of 1955; and A. S. No. 459 of 1957 as the plaintiff in O. S. 172 of 1955, on the file of the Subordinate Judge, Irinjalakuda. The facts are thus: O. S. No. 172 of 1955 concerns the amounts covered by two post-dated cheques, Exts. B and C dated 7-1-1122 drawn by the 1st defendant on the Catholic Union Bank Ltd., Irinjalakuda, and the Cochin Nair Bank Ltd., Irinjalakuda, respectively, and discounted in the plaintiff Bank on 29-12-1121 when the 3rd defendant was officiating as manager thereof. No cash was really advanced that day on Exts. B and C. The cheques were in fact deposited in the plaintiff-Bank in apparent discharge of prior like cheques on which money was advanced by the 2nd defendant who was the permanent manager of the Bank. Exts. B and C were dishonoured by the drawee banks on representation on due date for payment. The plaintiff claims the amounts of the cheques from the defendants. The court below has decreed the suit against the 1st defendant and that has become final now. A. S. No. 459 is against the dismissal of the suit against the 2nd defendant. The contention of the 2nd defendant is that the discounting was made in the regular course of business of the Bank, and involved no particular negligence on the part of the manager,

and therefore he could not be made liable for the suit claim.

The 3rd defendant was the accountant of the plaintiff Bank, but was dismissed from service without notice on 12-3-1122. She instituted O. S. No. 177 of 1955 for arrears of pay due to her from 1-2-1122 to 12-3-1122 as also a month's pay in lieu of notice. The court below has decreed that suit and A. S. No. 457 of 1957 is by the Bank against that decree.

For the sake of convenience the parties will be referred to hereinafter by their rank in O. S. No. 172 of 1955.

2. The course of dealings that led to the presentation of the cheques, Exts. B and C, are detailed by the Subordinate Judge in Appendix A to his judgment, the correctness of which is not challenged before me by counsel. The 1st defendant drew cheque No. 535 dated 19-4-1121 for a sum of Rs. 2,500/-. It was discounted by the 2nd defendant at the plaintiff-Bank. The 1st defendant did not pay the amount covered thereby, but gave another post-dated cheque in discharge of the same quite a good number of times in succession. Thus, the cheque No. 535 dated 19-4-1121 was paid off by cheque No. 868 dated 25-6-1121 for Rs. 2,500/-, cheque No. 998 dated 12-7-1121 for Rs. 2,500/- cheque No. 1113 dated 9-8-1121 also for Rs. 2,500/-, and then by cheque No. 1216 dated 11-9-1121 for Rs. 3000/-.

On 19-4-1121 the 1st defendant had drawn another cheque, No. 536, for Rs. 2500/-, which was also paid off, as in the case of its companion cheque No. 535 of even date, by cheque No. 869 dated 25-5-1121, cheque No. 999 dated 12-7-1121, cheque No. 1114 dated 6-8-1121 and cheque No. 1121 dated 12-9-1121 all for the same sum of Rs. 2,500/-.

On 26-6-1121 he had drawn cheque No. 819 for Rs. 2,500/- likewise paid by cheques No. 1137 dated 13-8-1121, No. 1225 dated 13-9-1121, and No. 1338 dated 9-10-1121.

He had further drawn cheque No. 1270 dated 11-9-1121 for Rs. 2,500/- and renewed it by cheque No. 1337 dated 9-10-1121.

On 14-11-1121 as per the above four series of cheques a total sum of Rs. 10,500/- was due from the 1st defendant to the plaintiff Bank. On that day he remitted Rs. 6000/- and executed cheque No. 1459 for the balance of Rs. 4,500/-. That too was not honoured by payment but was renewed successively by cheque No. 1484 dated 21-11-1121, cheque No. 1580 dated 29-12-1121 and cheque No. 20 dated 7-1-1122 which last-mentioned cheque is Ext. B in the case.

On 13-11-1121 the 1st defendant drew cheque No. 1454 for Rs. 1,350/-. It was paid off by cheque No. 1468 dated 20-11-1121, No. 1579 dated 29-12-1121 and No. 21 dated 7-1-1122 all for the same sum of Rs. 1,350/-, the last-mentioned cheque being Ext. C in this case.

Thus it is seen that in respect of the transactions covered by Exts. B and C, the

amount of Rs. 1,350/- covered by the latter was advanced on a cheque dated 13-11-1121 and Rs. 4,500/- covered by the former is traceable to the advances made much earlier. 3rd defendant, examined as D. W. 1, identified these cheques as post-dated cheques.

3. According to the plaintiff all the above mentioned cheques were not intended to be cashed even on their due dates and were never sent to the drawee banks for realisation. They were discounted by the manager (2nd defendant) in the Bank only to render financial aid to his cousin the 1st defendant who was then in difficulties. The 1st defendant had an overdraft accommodation in the plaintiff Bank, evidenced by Ext. J and secured on his properties, but it was subject to a maximum of Rs. 7000/-. The second defendant had no authority to issue loans from the Bank. To circumvent these obstacles to lend further amounts to the 1st defendant from the Bank, defendants 1 and 2 colluded and resolved that the 1st defendant should draw post-dated cheques on other banks and cash them at discount at the plaintiff-Bank, that the 2nd defendant should not send the cheques to the drawee banks even on their due dates but take other post-dated cheques in satisfaction in succession. The course of dealing narrated above bears out this arrangement copiously and show that several thousands of rupees have been lent to the 1st defendant under the camouflage of cashing post-dated cheques on discount. As observed in Bhashyam and Adiga's Negotiable Instruments Act, a cheque presented and paid will not be "evidence of money lent or advanced by the banker to the customer; on the other hand, it is prima facie, evidence of the repayment of money previously lodged by the customer in the banker's hands".

4. D. W. 1, the 3rd defendant, has been examined at length for the defence. She has sworn to the concerned course of dealing thus:

.....A cheque for Rs. 1350/- was discounted by the 1st defendant on 20th Mithunam 1121. Then, I was not aware that K. R. Anthony (1st defendant) was a debtor, Was not the amount shown at Serial No. 1455 on page 118 of this Ext. III as paid on discounted cheque due on the 20th ?--(Q). They are post-dated cheques. On the due date commission would be collected and a renewed cheque taken--(Ans.). At No. 1459, page 120 of Ext. HI do you find Rs. 4500/- remaining due on a cheque ?--(Q). That too relates to the discounting of a post-dated cheque. Amount was due to the bank as per that cheque.--(Ans.) At No. 1215, page 92, Ext. III do Rs. 2000/- remain due?-(Q). A cheque was drawn on that day. That was the cheque drawn on 11-9-1121--(Ans.)- When a post-dated cheque is pending collection, it may be renewed. No amount is paid. Post-dated cheques used to be given in several ways. If a post-dated cheque is given today, commission will be debited for 15 days. When that period expires, it may be renewed on payment of further commission. Post-dated cheques are cheques renewed in this manner.....Is the amount of Rs. 1350/-, entered in Ext. AM, an actual payment?--(Q). It may be a renewal-(Ans.). On the due date of the cheque, the amount will be credited, and a new cheque will be obtained. On

that day Rs. 1350/- may not have been received in cash.....Was there any reason for not sending this cheque (for collection) on that day ?--(Q). Cheques given as post-dated cheques were used to be returned on receipt of renewed cheques--(Ans.).....Cheque No. 1468 has not been sent for collection. After the due date, if a new cheque is given, it need not be sent for collection. If a new cheque is not given in renewal of the old one, it has to be sent. That was the usage in the bank. Cheque No. 1468 was renewed on 29-12-1121 M. E. The commission taken was Rs. 4--3--6.....Renewal cheques have been taken from the 1st defendant several times. Other persons also used to cash cheques like this, in the bank. I do not know whether they used to renew post-dated cheques.

5. It now pertains to consider the validity of such a dealing in post-dated cheques in banking practice. Sheldon in his book "The Practice and Law of Banking" 5th Edn. at p. 6, observes:

.....if a banker pays a post-dated cheque, and dishonours other cheques, which would otherwise have been paid, he will be liable to his customer for damages to his credit. If he holds such a cheque pending the arrival of the due date, the customer may fail in the meantime. And the banker cannot debit his customer's account with a post-dated cheque on arrival of its due date if the customer stops payment of it before such date. In the Gilbert Lectures, 1917, Sir John Peget expressed the opinion "that a banker who pays a post-dated cheque before the ostensible date, stands a very poor chance of being able to debit his customer with it in any conceivable circumstances if the customer chooses to object to be so debited".

Tannan, in his Book "Banking Law and Practice in India" (Ninth Edn. p. 172), catalogues the risks in discounting post-dated cheques. If the customer stops payment of the cheque before its due date the banker may not be able to collect his money. The banker has no right to debit his customer's account with the amount of the cheque before its due date. If the banker pays a post-dated cheque before its due date and holds it until it matures, the customer may fail to pay the same on account of his insolvency, insanity or death in the meanwhile and the banker would not be entitled to debit the amount to the customer's account at all.

In Bhashyam and Adiga's Negotiable Instruments Act (10th Edn. p. 58-59) we find the note:

They (cheques) are always drawn on a bank or a banker, and are payable immediately on demand without any days of grace.....Cheques are supposed to be drawn upon funds in the hands of the banker.

6. In *Ramchurn Mullick v. Luchmeechund Radakissen* (9 Moo. P. C. 46, 69) the Judicial Committee observed :

A cheque does not require acceptance;.....it is not intended for circulation, it is given for immediate payment it is not entitled to days of grace; and though it is,

strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the culinary understanding of persons, it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker;.....

Lord Wright reiterated these observations in AIR 1944 58 (Privy Council) and added:

The customer's right to draw a cheque depends on his having satisfied the contractual conditions which require the bank to honour his mandate to pay the cheque.....The cheque in question was post-dated. Post-dated cheques are a peculiar species, which have been described as objectionable.....It has there (in the United States) been held there is no authority implied by law for an officer of a bank to certify a cheque until on or after the date when it is made payable and that anyone taking a post-dated cheque before the day of its date is put upon enquiry.....But, the material invalidity is that of the certification, taken in connexion with the fact that the cheque was post-dated. The true anomaly or invalidity consists in the attempt to apply certification to a cheque before it is due. Certification of a cheque when it is due may have operative effect and be valid as being directed to a cheque due in praesenti, such certification being presumably followed by debiting the drawer's account with the amount. This is particularly apparent when regard is had to the American or Canadian theory, that certification is equivalent to payment. It is impossible to treat the cheque as paid before it is due.....It is not easy to see why novel and anomalous theories should be invented to justify an unusual and unnecessary proceeding. This case can, however, be decided simply and sufficiently on the ground that the ostensible authority of the manager did not extend to cover the certifying of post-dated cheques and that in the present case the manager had no actual authority to do so. The bank accordingly was not bound.

These observations of their Lordships of the Judicial Committee apply on all fours to the facts of the present case, where the only difference was that, instead of certifying, the post-dated cheque was discounted and either cash was paid or the amount adjusted towards prior dues.

7. Appendices B and B1 to the judgment of the court below show that in the years 1119 and 1120 considerable volume of business had been done between the plaintiff Bank and the 1st defendant; but that cannot generate any immunity for deceptive practices. The practice of encashing post-dated cheques and holding the same till the due date without ascertaining the credit of the drawer at the drawee bank, and of entering the same as been realised on discounting another post-dated cheque tantamounts to a fraud in Banking practice. It amounted to lending without authority.

Counsel for the 2nd defendant contended that such a practice had been in the Bank since 1118 with the knowledge and tacit consent of its Directors. To make out such tacit consent, reliance was had on the balance-sheets of the Bank for

the years 1118 to 1121 which showed large amounts as remaining at the close of the year to be collected on discounted cheques. But they do not give any indication as to whether those cheques were normal cheques, post-dated cheques, or renewals of post-dated cheques. It is therefore difficult to find from the balance-sheets that the practice of discounting post-dated cheques and accepting other post-dated cheques in satisfaction thereof had the consent of the Board of Directors or the General Body of shareholders of the Bank. Admittedly there was no express authorisation by the Board or the General Body for the manager, the 2nd defendant, to indulge in such a practice. He was not authorised to advance loans from the Bank to the 1st defendant beyond the overdraft accommodation of Rs. 7000/-sanctioned by the Board of Directors under security taken as per Ext. J. It then follows that, if discounting post-dated cheques tantamounts to issue of loans, which I have found it does, it can only be an ultra vires act on the part of the manager; the Bank cannot be bound by the same and would be entitled to call upon the manager to restore the amount thus lost to the Bank.

8. Much reliance was placed by counsel for the 2nd defendant on the admission of P. W. 1, who is one of the Directors of the Bank, that post-dated cheques used to be cashed in the Banks according to the status of the parties concerned. The statement does not, in my view, advance the cause of the 2nd defendant. "Communis error facit jus" (common error passes as law) is not a maxim of universal application; but often yields to its counterpart "Multitudo errantium non parit errori patrocinium" (The multitude of those who err gives no excuse to error).

9. Of course, the primary liability for the amount drawn by the 1st defendant is on himself. But as concerns the Bank, the liability is equally on the 2nd defendant by whose ultra vires acts the loss was brought on the Bank.

The court below has found that the Bank had never prohibited such discounting and therefore the transaction should be held authorised by the Bank. It has also found fault with the plaintiff for not entering the witness-box to prove want of authority for such discounting. I am unable to appreciate the reason in these observations. The course of dealing being, to adopt the expression of the Judicial Committee, "objectionable" and incompatible with normal banking practices, the burden of proof of immunity by special authorisation is on the 2nd defendant, who deliberately indulged in it, and not on the Bank to prove its negation as part of its cause of action. When amounts have been advanced by the manager without sanction he was doing it on his own responsibility and if the advance was not repaid by the drawer he must make good the same to the Bank.

10. In the result, A. S. No. 459 of 1957 succeeds. There will be a decree against the assets of the 2nd defendant for such sum as has been decreed by the court below against the 1st defendant, inclusive of costs therein, subject to the modifications that interest on the principal sum adjudged shall be at 5% per annum from date of suit and there shall be no interest on costs. Defendants 4 to

7 will also be personally liable for the costs decreed. As the Bank remained quiescent in the matter, in spite of the entries in the concerned balance-sheets, the Bank shall be refused its costs in one court, which shall be in this Court.

11. A. S. No. 457 of 1957 is against the decree for arrears of pay and compensation of a month's pay in lieu of notice, made by the court below in favour of the quondam accountant of the plaintiff Bank. The Bank has not denied the claim for arrears of pay, nor has it asserted to have given her notice of its intention to terminate her services before it was done. In the circumstances the decree in O. S. No. 177 of 1955 has only to be upheld. A. S. No. 457 of 1957 therefore fails, and is dismissed but in view of her consociation in the ultra vires acts of the 2nd defendant which led to her dismissal, there will be no order as to costs in this appeal. The rights, if any, of the 2nd defendant under Act XXXI of 1958 will not be affected by this judgment.