

(1960) 05 P&H CK 0008

In the Punjab And Haryana At Chandigarh

Case No : First Appeal No. 61 of 1954 with cross objections

Punjab National Bank Ltd.

APPELLANT

Vs

R.B.L. Benarsi Das and Co.

RESPONDENT

Date of Decision : 24-05-1960

Acts Referred:

Contract Act, 1872 — Section 182, 212, 214
Limitation Act, 1963 — Article 90

Citation : AIR 1960 P&H 590

Hon'ble Judges : I.D. Dua, J; Bishan Narain, J

Bench : Division Bench

Judgement

I.D. Dua, J.

(1) This appeal arises out of a suit instituted by the Punjab National Bank Limited with its registered office at 8, Underhill Road, Delhi, for the recovery of Rs. 18,046/13/10 on the basis of an overdraft account against Rai Rahadur Lal Banarsi Das and Company Limited having their registered office at Ambala Cantonment.

(2) According to the plaintiff's version, the defendant firm opened an overdraft account with the plaintiff-Bank and agreed to pay interest on the unsecured amount due at 9 per cent per annum. On 29-2-1952 a sum of Rs. 18,532/6/6 was due to the plaintiff-Bank, and after deducting two items of Rs. 39/5/11 and Rs. 446/2/9 due from the plaintiff-Bank to the defendant-firm against other accounts, a sum of Rs. 18,046/13/10 was in the circumstances the net balance due to the plaintiff from the defendant.

(3) In resisting the suit the defendant first raised a preliminary objection questioning the authority of the Manager of the plaintiff-Bank to file the present suit. On the merits it was pleaded that only a sum of Rs. 1,770/1/- was due to the plaintiff-Bank from the defendant-firm after adjusting and obtaining credit for Rs. 11,951/8/9 on account of hundi and railway receipt handed over to the plaintiff-Bank for collection from Messrs. Babu Ram-Mela Ram through the Union

Mercantile Bank, (hereinafter described as Mercantile Bank) Nangal Township. The rate of interest was also controverted, the defendant's case being that the overdraft account was to carry interest at the rate of 4 1/2 per cent per annum only and not 9 per cent per annum as claimed by the plaintiff.

Strictly speaking the sum of Rs. 11,951/8/9 on account of the hundi and the railway receipt was pleaded in the nature of a claim for a set-off. In this connection it is necessary to mention that the defendants asserted that the plaintiff-Bank was guilty of extreme negligence and delay in presenting the relevant draft as also of otherwise behaving in an improper and unbusiness-like manner in performing its duties as a banker.

(4) In its replication the plaintiff-Bank denied the allegations of neglect or default on its part and pleaded that the defendants had definitely instructed the plaintiffs to present the bill for collection through the Mercantile Bank, with the result that its duty and responsibility came to an end as soon as it acted in accordance with the mandate given by the defendants. It was further asserted that the plaintiff had done its utmost in trying to collect the amount, but as a result of the dilatory tactics intentionally devised by the Mercantile Bank, who was a nominee of the defendants, it had become utterly impossible for the plaintiff to recover the amount from the Mercantile Bank.

There being no Branch of the plaintiff-Bank at Nangal, implied authority to employ an agent for the collection work in the present case was also relied upon, and it was expressly pleaded that such an appointed sub-agent was to be looked upon as the agent of the principal. The admissibility of the counter-claim was controverted and it was pleaded that, if so advised, the defendants could file a fresh suit, but no inquiry into this claim could be lawfully held in the present suit. In the alternative it was pleaded that if the Court decided to permit the defendants to urge this counter-claim, then the same was barred by limitation and was also liable to rejection for want of proper court-fee stamp.

It was further averred that the transaction with respect to the draft and the railway receipt had not taken place between the parties in the same capacity, character and status as the cash credit account in question, and on this ground also the counter-claim was contended to be inadmissible in the present suit. On 11th of August 1952 in the trial Court the defendants give up the objection regarding the authority of the plaintiff-Bank's Manager to file the suit and stated that the main dispute in the case really centred round the unrealized sum of Rs. 11,951/8/9 for which the plaintiff-Bank was responsible because of its negligence. The counsel for the plaintiff reiterated the position that his client had diligently performed its duty as an agent and that if the amount was not recovered it was the defendant alone who must suffer the consequences.

(5-11)(After stating the issues and giving the history of the dispute, the Judgment continues as under:-) The above resume gives all the correspondence relevant for our purposes and it is unnecessary to refer to any future

correspondence. The question which arises for consideration is as to how far the plaintiff Bank is negligent in discharging its duties as a collecting Bank on the facts and circumstances of the present case and whether or not the defendant's claim with respect to the sum of Rs. 11,951/8/9 against the plaintiff-Bank is justified. It is equally unnecessary, in view of the correspondence given above, to refer in detail to the oral evidence because the position as it emerges from the various letters, hardly needs any clarification or explanation.

(12) Mr. Puri on behalf of the plaintiff has placed reliance on three decided cases in support of his contention that the defendant having nominated the Union Mercantile Bank to the agency through which the plaintiff-Bank was to collect the amount on the railway receipt and the hundi, any misconduct or dishonest behaviour on the part of the Union Mercantile Bank cannot constitute his client's negligence and thus cannot impose on the plaintiff-Bank the liability for non-realisation of the amount of the hundi. *De Bussche v. Alt.* (1878) 8 Ch. D. 286, is the first authority on which the counsel has placed reliance. Particular passage relied upon occurs at page 310. It is laid down there:

"As a general rule, no doubt, the maxim *"delegatus non potest delegare"* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligation to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason for the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed *"a sub-agent"* or *"substitute"*. (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute.

And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if

he had been appointed agent by the principal himself."

(13) The second case is Central Bank of India Ltd. v. Firm Rur Chand Kurra Mal 1958 60 Pun LR 235: (AIR 1958 Punj 159), in which the principle laid down in the first case was approved by a Division Bench of this Court.

(14) Chowdhury T.C. and Bros. Vs. Girindra Mohan Neogi, is the third decision and in this case also De Bussche's case (1878) 8 Ch D 286, among others, was relied upon for the following observations:--

"The issue depends upon whether the defendant-Bank on behalf of the plaintiffs and the Khulna Bank agreed that the Khulna Bank should act at Khulna as the plaintiffs' agent for the purpose of collecting the bills or, in other words, whether the defendant-Bank created privity of contract between the plaintiffs and the Khulna Bank. In my opinion, that is the true test to determine whether the person appointed by an agent authorised in that behalf to perform part of the business of the agency is a substituted agent of the principal or the sub-agent of the agent, and the test to be applied is the same whether the case falls within S. 194 or whether, as in the present case, the person so appointed is the nominee of the principal although there is a difference in the obligation undertaken by the agent, for S. 195 applies to a case falling within S. 194, while in cases where the substituted agent is the nominee of the principal, the agent is not concerned with the character or efficiency of the person so appointed, and his obligation quoad the part of the business of the agency entrusted to the substituted agent ceases if and so soon as privity of contract has been created between the substituted agent and the principal."

After applying the above test to the facts of the case before him the learned Judge proceeded thus-

"As I apprehend the facts, in endeavoring to carry out the collection of the bills at Khulna, the Khulna Bank was not acting under the control of the defendant-Bank, for, so far as the collection at Khulna was concerned, the defendant-Bank was acting under the direction of the plaintiffs who throughout took charge of the transaction. The defendant-Bank, in my opinion, was merely the conduit pipe through which the plaintiffs communicated their instructions to the Khulna Bank, and, inasmuch as the defendant-Bank invariably, I think, forwarded to the Khulna Bank the communications which they received from the plaintiffs, it is clear that the Khulna Bank was fully aware that the instructions which the defendant-Bank forwarded to them proceeded from the plaintiffs, and not from the defendant-Bank".

(15) In so far as the principle laid down by Thesiger L. J. in De Bussche case (1878) 8 Ch D 286, at page 310 of the report is concerned, this has since received the approval of the Supreme Court in Union of India (UOI) Vs. Amar Singh, The question, however, is whether on applying this test the Mercantile Bank has become the agent of the plaintiff before us or whether it is really a sub-agent of the defendant-appellant.

(16) On behalf of the respondent it has been urged that in the case of the Central Bank of India 60 Pun LR 235: (AIR 1958 Punj 159) , the question of the agent's negligence was not considered, as on the admission at the Bar in that case, this question did not arise on the findings given by the Court. Besides, in that case, according to Mr. Sibal, instructions had been taken as laid down in S. 214 of the Indian Contract Act. In the case of Chowdhury T.C. and Bros. Vs. Girindra Mohan Neogi, too, according to the respondent, information had been given to the principal and, therefore, the question of the liability of the original agent did not arise. While commenting on this decision the respondent has contended that in the present case the Mercantile Bank could not possibly have paid the amount of the draft to the defendant-respondent direct, there being no privity of contract-express or implied between them.

(17) Reference was then made of S. 182 of the Indian Contract Act which defines "agent" and "principal", the argument being that the plaintiff-Bank is clearly the agent of the defendant-respondent. A passing reference was also made to Halsbury's Laws of England, Third Edition, Volume 1, para 405, where three classes of sub-agents have been thus described:

"(i) those employed without the authority, express or implied, of the principal, by whose acts the principal is not bound;

(ii) those employed with the express or implied authority of the principal, but between whom and the principal there is no privity of contract; and

(iii) those employed with the principal's authority, between whom and the principal there is privity of contract, and a direct relationship of principal and agent is, accordingly, established".

It is submitted that the present case falls in category (ii); the case of the appellant, on the other hand, being that it falls under category (iii). I need hardly refer to the provisions of S. 212 of the Indian Contract Act, because it is not disputed that an agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons has notice of his want of skill, and also that the agent is always bound to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

(18) In my opinion, after considering the evidence on the record, particularly the correspondence which passed between the parties, the position of the Mercantile Bank is that of the sub-agent appointed under the authority of the defendant firm, but without there being any privity of contract between them. The question which arises for consideration, therefore, is how far is the Punjab National Bank guilty of negligence and what is the extent of its liability of the defendant-firm for the non-realization of the amount of the draft in question. It has been contended on behalf of the respondent that as provided in S. 214 of the Indian Contract Act it was the duty of the Punjab National Bank, as an agent, in case of difficulty, to

use all reasonable diligence in communicating with his client, and in seeking to obtain their instructions.

In this connection he has emphasised that as soon as the Punjab National Bank realized that the Mercantile Bank was postponing payment on frivolous pretexts, it should have immediately informed the defendant-firm and sought instructions from it. On the other hand Mr. Puri has contended that the Mercantile Bank being the choice of the defendant-firm for the purpose of realizing the amount of the draft from Messrs. Babu Ram Mela Ram, it was their duty both to realize the amount from Messrs. Babu Ram Mela Ram and to pay it to the Punjab National Bank for being credited to the account of Banarsi Dass and Company Limited. He has further contended that, in any case, the Mercantile Bank being financially unsound from the very beginning of its appointment as agent for the collection of the draft in question, even if the Punjab National Bank had informed Banarsi Dass and Company, nothing could possibly have been realized from the Mercantile Bank and, therefore, no loss has accrued to the firm directly on account of the Bank's failure to inform the former and to seek its directions. Mr. Sibal, however, argues that the financial position of the Mercantile Bank is wholly irrelevant and that the direct consequences of the Bank having not informed the firm of the delaying tactics of the Mercantile Bank have directly resulted in the loss of the amount of the draft to his clients.

He has in this connection laid great emphasis on the want of diligence shown by the Ambala Cantonment Hoshiarpur and Nangal Branches of the Punjab national Bank in dealing with the matter of presentation of the draft which in the circumstances called for greeted promptitude than the evidence discloses. He has also stressed that, even, to begin with, the Punjab National Bank should not have accepted the draft from the Mercantile Bank but should have insisted on cash payment. In any case, it is contended, that once it was made to appear that the Mercantile Bank did not mean business and that it was merely gaining time and delaying the payment of the draft on frivolous grounds, the Punjab National Bank should not have accepted a duplicate or a substituted draft on the second occasion; wan to proper scrutiny while accepting the duplicate draft has also been adversely commented upon. At least, so argues the counsel Banarsi Dass and Company should have immediately been informed by the Bank when unreasonable delay had been caused by the Mercantile Bank in making the payment and when its bona fide were, or, at any time, should have been, suspected.

(19) In my opinion the Punjab National Bank is undoubtedly guilty of negligence in dealing with the business of collecting the draft from Messrs. Babu Ram Mela Ram through the Mercantile Bank. It is true that the Mercantile Bank, Nangal, had been named by Banarsi Dass and Company for collecting the draft. But the instructions issued to the Punjab National Bank were that no realizing the amount of the draft it was to be credited to the Company's account. It appears to me fairly well settled that if a banker is dilatory in endeavoring to procure

acceptance or payment or is otherwise negligent in doing the business of the agency and his customer suffers for the consequences, the banker would be liable to make it good. It is equally well established that the collecting banker is under no special duty as such to protect the interests of the person to whom he presents the interests of the presents a draft for acceptance or payment.

It is his obligation to use all reasonable diligence in presenting for payment, though what is reasonable is always a question of fact in the circumstances of a given case. A banker is thus bound to do not only what is legally imperative upon a holder but also what is prudent in the interests of his customer. The banker must Act in good faith and without negligence; the onus of proving the absence of negligence is on the baker. What is negligence must necessarily vary with the facts of each case, but the duty out of which the negligence may arise is an implied duty to use due care towards the true owner of the cheque whilst collecting the cheque for the mandatory.

(20) I now come to the plea of limitation. Mr. Puri has contended that the claim is barred by time under Art. 90 of the Indian Limitation Act. According to the counsel, the terminus a quo was the date when the neglect or misconduct became known the plaintiff, and this, according to him, would either be 30-3-1949 or 21-4-1949; in any case he submits that it could by no means be after 4-5-1949, when a letter was sent by Messrs. Banarsi Dass and Company to the Punjab National Bank, Ambala Cantonment. The claim being barred by time on 26-5-1952, when the written statement was filed by Messrs. Banarsi Dass and Company, the counsel submits, the defendant could not ask for adjustment of the amount of the draft.

In support of his contention reference has been made to *Saw Hla Pru v. S. S. Halkar* AIR 1932 Rang 1, in which a suit for damages against an advocate by his client for the former's negligence was held to be governed by Art. 90. *Janki Koer v. Mahabir Prasad* 25 Ind Cas 806: (AIR 1914 Cal 888), is another decision in which in a suit by a principal against his agent for neglect in the discharge of duties Art. 90 was applied and the terminus a quo was the date when the agent's neglect became known to the principal, and not when the principal came to know that there was sufficient cause for a good case being run against the agent. In my opinion these decisions do not touch the real point which arises in the present case, because here we have to see if there is any period prescribed for a claim of set-off.

It is well established that law of limitation merely bars the remedy but does not destroy extinguish the right unless expressly so provided. There is no provision laying down limitation of set-off with the result that Art. 90 would not be applicable to the case. There is also authority for the view that the Limitation Act should be strictly construed in favour of the right to proceed. I, therefore, unhesitatingly reject this contention.

(21) The question which next arises for consideration is that of the extent of the

liability of the Bank of the consequences of its negligence. It is common ground that it has to make compensation to the defendant only in respect of the direct consequences of its neglect and that it cannot be held liable in respect of loss or damage which is indirectly or remotely caused by such neglect. Mr. Puri has contended that the financial position of the Mercantile Bank was so weak that it was not at all possible to realize the amount of the draft from it, whereas Mr. Sibal has contended that the financial position of the Mercantile Bank is wholly irrelevant. He has, in the alternative, contended that if his clients had been informed in proper time, they would perhaps have taken some drastic steps by putting pressure on the Mercantile Bank and would even have filed suits and secured some interlocutory orders for safeguarding their interests.

In this connection Mr. Sibal has also referred to Illustrations (a) and (b) under S. 212 of the Indian Contract Act. These illustrations, however, are not of much assistance, because the facts of both of them clearly show that the consequences which arose from the breaches there were direct. The contention on behalf of the Bank in the present case is that the non-recovery of the amount is not the direct consequence of the Bank not informing the defendant or in not presenting the draft as promptly as is contended by Mr. Sibal. In this connection it is instructive to refer to the evidence of Shri B. P. Roy, Registrar, Joint Stock Companies, Bengal. It is clear from this evidence that the Mercantile Bank was incorporated on 18-3-1944 and that the name of this Bank was struck off as being a defunct company on 21-4-1950.

The last papers received in the Registrar's office was about the change of the Bank's office from Canning street, Calcutta, to Synagogue Street, Calcutta, and the name of the Bank was struck off when they found that there was no information traceable about it. He has also stated that action was taken against the Bank on 5-5-1948 before the Chief Presidency Magistrate but as the Directors were not traceable, it was filed on 31-8-1948. From this evidence the inference is irresistible that whatever kind of information the Bank would have given to the defendant, it is most unlikely that any substantial amount could be recovered on account of this draft. It is true that Khazan Singh D.W. 4, who is the landlord of the building in which the Mercantile Bank functioned at Nangal from December, 1948 to 6th of July 1949, received the amount of his rent which had been fixed at Rs. 100/- per mensem, but even he could not realize the whole of his balance of deposit from this Bank; a sum of Rs. 300/- or Rs. 400/-, due to him still remained unpaid.

This witness had also deposed that on 7-7-1949 the plaintiff-Bank opened their Branch in this very building at Nangal. He is, however, not sure if the Mercantile Bank people removed all their goods from the building. Tek Chand D.W. 5 has also stated in his evidence that the Mercantile Bank people used to harass their customers and that the Manager of the Hosiarpur Branch of this Bank and his brother had actually been arrested. The Bank also defaulted in the payment of the salaries of its peons. This witness is the landlord of the building leased out to

the Hosiarpur Branch of the Mercantile Bank. From this evidence it appears to me that the non-recovery of the amount of the draft can hardly be described as a direct consequence of the negligence of the Punjab National Bank.

(22) It has been contended on behalf of the respondent that the plaintiff-Bank should not have accepted a draft but should have in the very beginning insisted on cash payment and that omission to do so in the direct cause of the loss. This contention is in my view misconceived. Drafts and cheques are the usual and normal modes of modern banking business and the plaintiff-Bank can by no means be considered to have been negligent or to have done anything wrong in accepting the draft in question. Nothing has been shown to us as to why the plaintiff-Bank should have adopted the procedure of insisting on cash payment when the defendant-firm had not given any such instructions specifically.

It is then contended that at least on the second occasion, when a duplication draft was given, cash payment should have been insisted upon. Here again it is a little difficult to agree with the respondent. Unless it can be positively shown that the plaintiff-Bank must have been convinced that without adopting the special procedure of insisting on cash payment from the Mercantile Bank the draft could not have been honoured at all, the plaintiff-Bank cannot, in my opinion, be considered to be in breach of its obligations or duties as an agent merely by its omission to insist on cash payment.

The subsequent events cannot justifiably be taken into account while considering the question of what the plaintiff-Bank should have done at the time when the drafts were received from Mercantile Bank. Mere mistake or error of judgment, unless it is clearly shown to be worthy unreasonable in the circumstances, can rarely--if at all--be considered to be sufficient to fix the liability on the plaintiff-Bank. In my view it was clearly for the defendant, on the facts and circumstances disclosed on the present record, to establish that any earlier information would have enabled them to realize the amount of the draft.

That the plaintiff-Bank's negligence is the direct cause of the loss sustained by the defendant, as also the extent or the quantum of such loss, has, on the peculiar facts of this case, to be established by the defendant-firm, in doing which, in my opinion, they have not succeeded.

(23) In the light of the above discussion, I am constrained to hold that the plaintiff-Bank is entitled to a decree for a further sum of Rs. 11,951/8/9, but as the plaintiff-Bank has been negligent, the parties must bear their own costs throughout. In so far as the claim with respect to the interest is concerned, the appellant has said nothing substantial against the grant of interest 4 1/2 of percent per annum instead of at 9 per cent per annum. Interest thus can only be allowed at 4 1/2 per cent annum, which has been determined by the lower Court to be Rs. 1,147,15/4.

(24) In view of the above findings, the cross-objections with respect to claim of proportionate costs must obviously fail; in so far, as the ground with respect to

interest is concerned, here again no arguments were addressed by the respondent showing as to on which items and for which period interest at 9 per cent per annum has been calculated by the Court below. The cross-objections are thus also dismissed but with no order as to costs.

(25) In conclusion, therefore, the appeal is allowed and the plaintiff is granted a decree for Rs. 16,017/- /5, the parties bearing their own costs throughout.

Bishan Narain, J.

(26) I agree.

(27) Appeal allowed.