

(2001) 01 CAL CK 0011
In the Calcutta High Court
Case No : C.S. No. 216 of 1996

Santosh Kumar Agarwal

APPELLANT

Vs

Oriental Bank of Commerce and Others

RESPONDENT

Date of Decision : 18-01-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 21

Citation : (2001) 105 CompCas 976

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Ajoy Kumar Chatterjee, for the Appellant; Soumitra Sen, for the Respondent

Judgement

Amitava Lala, J.—This is a suit for : (a) a decree for a declaration that the lien purported to be created and orally claimed by the defendant-bank on the fixed deposits mentioned in the schedule being annexure A hereto is void, inoperative, non est and is not binding on the holders of the fixed deposits and the defendant-bank is obliged to repay the said fixed deposits with interest thereon to the plaintiff ;

(b) a decree for Rs. 79,49,080 as pleaded in paragraph 20 hereto ;

(c) interim interest and interest on judgment at 21 per cent, per annum ;

(d) a decree for damages for defamation amounting to Rs. 10,00,000 (rupees ten lakhs) ;

(e) injunction ;

(f) attachment ;

(g) receiver ;

(h) costs ;

(i) further and other reliefs.

2. Defendant No. 2 is the proforma defendant and the actual contesting defendant is defendant No. 1-bank. Such bank, as described by the plaintiff, has its regional office at 107/1, Park Street, Calcutta-700 016, within the jurisdiction of this court. No leave under Clause 12 of the Letters Patent has been sought for by the plaintiff for having part of the cause of action in the said office. Therefore, it can be presumed, at this stage, that the plaintiff proceeded as if the said office has nexus and connection with the cause of action.

3. Defendant No. 1 contested the suit by taking various defences. Broadly, the plaintiff has no claim against the defendant as this court has no territorial or pecuniary jurisdiction to entertain, try or determine the suit since no part of the cause of action arises within the jurisdiction. The Khidirpore Branch office of the defendant has or had a dealing and transaction with the plaintiff and against that branch the plaintiff has made the claims. Such written statement has been verified by one Shri Bijoy Kumar Gupta, Assistant General Manager of the bank. It also appears that the verification was signed in the office at 107/1, Park Street, Calcutta-700 016. Affidavit of documents was also affirmed by the deponent from such office. Issues were suggested and ultimately the following issues were framed :

(1) Whether this court has any jurisdiction to entertain, try and determine the suit ?

(2) Was defendant No. 1 liable to pay to the plaintiff the sum of Rs. 50,00,000 being the amounts in aggregate held under ten several fixed deposit receipts as mentioned in paragraph 3 of the plaint, upon their respective maturity ?

(3) Was defendant No. 1 entitled to withhold payment under ten fixed deposit receipts on their respective maturity as mentioned in paragraph 3 of the plaint ?

(4) Had defendant No. 1 any right to claim set off and adjust the proceeds of matured fixed deposits against the alleged debit balance in the account of the plaintiff and/or Balaji Enterprise ?

(5) Had defendant No. 1 any right or was entitled to exercise general lien against matured fixed deposits for recovery of his alleged claim against the plaintiff ?

(6) Is the plaintiff entitled to a decree for Rs. 79,49,080 inclusive of interest as claimed in paragraph 21 of the plaint ?

(7) Is the plaintiff entitled to a decree for damages for Rs, 10 lakhs as pleaded in paragraph 24 of plaint ?

(8) To what relief the plaintiff is entitled ?

4. Witnesses were examined by the court as produced on behalf of either of the parties.

At the time of argument the defendants have formulated four distinct points as follows ;

- (1) Lack of jurisdiction ;
- (2) Non-joinder/misjoinder of necessary parties ;
- (3) Improper enjoyment of facility ;
- (4) Nexus with the companies who are involved in the circumstances.

5. Mr. Soumitra Sen, learned counsel appearing in support of the contesting defendant has very much harped on the point of jurisdiction. According to the defendant the transaction occurred between the plaintiff and the contesting defendant-bank at its Khidirpore Branch outside the jurisdiction of this court. The statement of the plaintiff, specially in its paragraphs Nos. 5 to 7, is speaking about the same being true to his knowledge as per the verification of the plaintiff. The defendant has been falsely implicated. It appears that a criminal proceeding has been instituted by the regional office at the instance of the branch which has a binding effect till the adjudication. Adjudication is open. The cause of action in the suit is non-payment of money arising out of the fixed deposits withheld on account of fraudulent transaction for which appropriate investigations were continued. Therefore, the cause of action in the suit is basically for non-payment of money which is due and payable, if any, from the branch of the bank at Khidirpore outside the jurisdiction of the court. Officers of the regional office have no nexus. In fact, instruction was given from the Delhi office and not from the regional office. Therefore, the suit could have been filed in Delhi, if at all, having nexus or connection thereto. He has relied upon relevant questions under examination-in-chief of the plaintiff, Sri Santosh Kumar Agarwal, being questions Nos. 41 to 51, 62 to 65 of the examination-in-chief and questions Nos. 296 and 297 of the cross-examination. He has stressed very much on question No. 297 which is as follows :

"There is no such communication to you either from the head office or regional office to that effect ? I personally visited the regional office and met the Assistant General Manager. He made a STD to the Delhi office and from there he intimated me that the information from Delhi office was that this enquiry has been done."

6. He has also relied upon the evidence of the witness on behalf of the defendant being one Sri Salim Mallick under its examination-in-chief being questions Nos. 7 to 16, 18, 40 to 45 and cross-examination of questions Nos. 98 to 108. The other witness on behalf of the defendant is one Sri Lalit Arora. Both deposed as the then employees of the bank of the Khidirpore Branch.

7. Learned counsel appearing for the defendant, by citing" a judgment reported in *Agenda Agencia Commercial International Limited and Others Vs. Custodian of the Branches of Banco Nacional Ultramarino*, contended before this court that the branch of the bank in which the account is maintained is a separate and distinct entity from its head office. Under normal circumstances, companies and their branches are not separate and distinct but exception lies in the case of banking companies when one can meet any contingency by showing proof of the debts

permissible on the basis of accounts maintained in the books of account of the relevant branches. He has also relied upon Romi Jaiswal Vs. Smt. Satya Bhama Jaiswal and Others, , that a judgment delivered by the court to establish that merely having a registered office or head office in any jurisdiction cannot give cause of action unless such office or offices has or have nexus or connection with the cause of action.

8. On the other hand, Mr. Ajoy Krishna Chatterjee, learned counsel appearing for the plaintiff, on being called upon, contended before this court that the right jurisdiction of the court was invoked by the plaintiff because the fixed deposit was withheld from being paid to the plaintiff at the instance of the regional office. Therefore, it has a nexus and connection with the cause of action. It is interesting that the affidavit of documents was affirmed and filed by one, Sri D.N. Ganguly, assistant general manager of the bank from its regional office. Therefore, unless and until the defendant possesses the documents in its regional office there is hardly any scope of filing such affidavit of documents. Moreover, all the correspondence was exchanged in between the plaintiff and the bank at the regional office and the defendant proceeded on the basis of the instruction of the said regional office.

9. Moreover, the bank should be sued as per the respective branch is not an absolute proposition. The judgment which has been relied upon by the defendant being Agenda Agencia Commercial International Limited and Others Vs. Custodian of the Branches of Banco Nacional Ultramarino, based upon The Delhi Cloth and General Mills Co. Ltd. Vs. Harnam Singh and Others, , wherein it has observed that (page 8}: "... if the bank wrongly refused to pay when a demand was made at the proper place and time, then it could be sued at its head office as well as at its branch office, but the reason was that the action is then not on the debt but on the breach of the contract to pay at the place specified in the agreement". The present suit is the plaintiff's breach of contract which has been committed by the bank at the instance of the regional office.

10. He has cited a judgment reported in Madan Mohan Prasad v. Coal India Ltd. [1998] 1 Cal LT 4 (HC). It appears from para. 11 as follows (page 8) :

"Insofar as the question relating to the jurisdiction is concerned, the impugned dismissal order which gave rise to the cause of action to the petitioner for filing this petition, the same has been passed with the approval of respondent No. 1. Undoubtedly respondent No. 1 resides in Calcutta where he has his head office. Since it is he who accorded his approval to the removal of the petitioner from service, which ultimately led to the passing of the impugned order, it can be safely said that a part of the cause of action did accrue to the petitioner in Calcutta, where the head office of respondent No. 1 is situated."

11. In the present suit it is evident that the witness on behalf of the bank admitted that the decision not to pay against fixed deposit receipts was given by the regional office and the endorsement to such effect was made in the

statement of accounts (exhibit 1).

12. Learned counsel further said that the judgment of the Single Bench of this court relied upon by the defendant as reported in Romi Jaiswal Vs. Smt. Satya Bhama Jaiswal and Others, has been affirmed by a Division Bench of this court in Smt. Smriti Jaiswal and Another Vs. Romi Jaiswal and Another,

13. The plaintiff also relied upon both the judgments because it is the case of the plaintiff that the regional office of the bank has nexus and connection with the cause of action and thereby it accrues within the jurisdiction of the High Court at Calcutta. Even the principle of forum convenience is closely applicable in the case of the plaintiff to that extent.

14. It further, relied upon the Supreme Court judgment reported in Pathumma and Others Vs. Kuntalan Kutty Dead by Lrs. and Others, . Learned counsel appearing for the plaintiff contended that the three conditions u/s 21 of the CPC being (1) the objection was taken in the court of first instance, (2) it was taken at the earliest possible opportunity and in case where the disputes were settled at or before such settlement and (3) there has been a consequent failure of justice must co-exist.

15. It appears to this court that non-payment or non-encashment of the fixed deposit was made by the Khidirpore Branch at the instance of the regional office. There is no doubt that all steps were taken by the regional office. The statement of accounts was also prepared by the regional office. It might have done so at the information of the branch itself but there must be a definite reason to believe that the regional office for the purpose of doing so took decision. Therefore, it is an unavoidable circumstance to say that the regional office has no nexus or connection with the ultimate relief of the plaintiff in this court of law. It may be a fact that the regional office has acted at the instance of the head office. Therefore, neither the head office nor the regional office nor the branch can avoid the responsibility towards the constituent. Such responsibility in other words, definitely gives a nexus or connection with the cause of action either of the three offices or any of such offices for the purpose of doing" so. There would not be any consequent failure of justice if any order is passed by this court because the branch of the concerned defendant-bank will have to act on the basis of advice or instruction of the regional office. Cause of action in the instant case is withdrawal or stoppage which has been done, so far as the branch office is concerned at the instance of the regional office situates within the jurisdiction of this court. Therefore, the whole cause of action for the purpose of withdrawal or stoppage of payment or encashment of the fixed deposit arose within the jurisdiction of this court. Hence, taking into account the totality of the circumstances I am of the view that issue No. 1 is affirmative, i.e., this court has jurisdiction to entertain, to try and determine the suit.

16. Since an additional issue was framed on account of technicality being "the suit as framed is bad for non-joinder or misjoinder of necessary parties" I have

to deal with the same before going into the merits immediately after the issue of jurisdiction. The whole purpose of raising this issue by the contesting defendant is that the suit was filed by one Sri Santosh Kumar Agarwal when the fixed deposits were granted in the joint name. The contesting defendant has relied upon questions Nos. 21 to 28 of the examination-in-chief and questions Nos. 186 to 189 of the cross-examination. It has also relied upon exhibit B and exhibit E copies of which are also available in page 48 and page 42 of the judge's brief of documents.

17. It appears that the fixed deposit receipts are made by the bank as "either or survivor". Such other party being claimant of the joint fixed deposit receipts is also proforma defendant herein. The plaintiff deposed by saying "that he himself or the proforma defendant are joint holders of the fixed deposits. The proforma defendant did authorise him to institute the suit. The only defence taken by the contesting defendant in this respect was that under exhibit B the authorisation, so given by the other holder of the fixed deposits being proforma defendant is a post-suit authorisation and that too restricted only in respect of filing the suit but not in connection with receiving of money under the fixed deposit. I find the witness has stated either in the examination-in-chief or in the cross-examination that the fixed deposits are received is meant for either the plaintiff or the proforma defendant. In any event upon going through the letter dated September 24, 1996, although it is post-suit affair, it appears that authorisation so given thereunder is not only restricted in respect of instituting the suit but also for receiving and realising the entire amount from the bank. The subsequent letter after instituting the suit squarely waives the dispute in respect of any payment in favour of the proforma defendant by letter dated July 20, 1994, being exhibit E. Moreover, the tender of exhibit B itself was objected to by the contesting defendant-bank itself as available in question No. 60 of Sri S.K. Agarwal in respect of receiving such letter being answered as "received in original". Under such circumstances, it appears that the defendant has lost the battle under issue of non-joinder or misjoinder of necessary parties not only due to their own cause at the time of examination of the witness but also in view of the consistent answer of the witness as well as exhibit B being page 48 of the judges brief of documents. Post-suit authorisation by the proforma defendant does not necessarily mean the suit has already been disposed of so that the question cannot be reopened. Post-suit authorisation is given hereunder immediately after service of the writ of summons on account of filing of the suit as well as receiving or realising the money. Under such circumstances, I hold affirmatively in favour of the plaintiff.

18. The other two points as raised by the contesting defendant-bank about enjoyment of facility and nexus with the company and who are the co-accused in the criminal proceedings are the questions related to the merits that is issues Nos. 2 and 3. However, the plaintiff submitted before this court that if the plaintiff can prove before this court that the defendant-bank has no right to claim set off or adjustment of proceeds arising out of fixed deposits as against the

debit balance in the account of the plaintiff and/or Balaji Enterprise, the bank has no right or is not entitled to exercise general lien against the fixed deposits. Therefore, issues Nos. 2 and 3 are only reliefs oriented. I accept the explanation of the plaintiff to that extent and straightaway come to issues Nos. 4 and 5, discussion of which can give the ultimate result because if the defendants fail to prove their right in any manner whatsoever including general lien, the defendant-bank cannot have any right to withhold the fixed deposits which is the ultimate result of the suit

19. The defendant-bank has drawn my attention to questions Nos. 77 and 78 and 114-117 of the examination-in-chief of Sri S.K. Agarwal. The plaintiff herein has also drawn my attention to questions Nos. 175-185 of the cross-examination. Under questions Nos. 77 and 78 as aforesaid the plaintiff being the witness stated that there was some overdraft for an amount of Rs. 50,000. Even in question No. 114 he has reiterated about the overdraft but as against question No. 117 he stated that he had no occasion to obtain a loan or credit facility for a sum of Rs. 37.50 lakhs. Even in question No. 118 he stated that he had no occasion to make an application for such loan. However, let me look into the cross-examination in this respect under referred questions Nos. 175 to 185 which according to the contesting defendant is important in this respect. I find that in the cross-examination under questions Nos. 175 to 185 the question of two cheques bearing" Nos. 981 and 982 were discussed which has been transferred on the 16th but not on July 15, of the concerned year. By saying so, learned counsel, appearing for the defendant contended that the transactions were made in between July 16, 1993 and July 21, 1993. Moneys were withdrawn and fixed deposits were created only in respect of the self-same amount. Therefore, the circumstances are not normal but suspicious. He has also referred to other questions in the cross-examination being questions Nos. 142 to 146 and questions Nos. 156 to 160. Learned counsel for defendant No. 1 has contended that the plaintiff stated on oath that the branch manager himself took the role of introducer or a person at the instance of the branch manager and the witness under the question cannot remember the name of introducer now. This type of answer definitely becomes an element of suspense. Similar questions were also asked and the same are available in the referred questions of the defendant being questions Nos. 145 to 160- However, he has described the name of the appropriate branch manager, at the relevant point of time by saying the name of such person is Sri Forman Ali.

20. He has also drawn my attention to exhibit G being PD 12 of the judge's brief of documents to create suspension in the mind of the court in respect of the conduct of the plaintiff. Such documents are the charge-sheet of the Central Bureau of Investigation signed as on November 21, 1995. It appears that Sri Forman Ali, ex-branch manager is one of the accused. However, within the list of the accused, is the name of one Sri "S.K. Agarwal alias of Sri S.K. Khemka, son of Late Pannalal Khemka, director of M/s. Narmada Merchant (P.) Ltd., 43, Sri Hariram Goenka Street, Calcutta-700 007 by incorporating the residence of 11,

Sri Hariram Goenka Street, Calcutta-700 007 arising as against accused No. 8. It is crystal clear even assuming for the moment though Sri S.K. Agarwal is the same person he has been described as co-accused being a director of a company which has got nothing today with the proprietorship of the plaintiff "Balaji Enterprise". Moreover, it also appears from the internal page 4 that the said Sri S.K. Agarwal signed as proprietor in the case of M/s. Balaji Enterprise wherein his son as director of the company in respect of M/s. Narmada Merchants (P.) Ltd. along with others. Certain confusing statements in the charge-sheet itself are also creating the suspicion in the mind of the court not against the plaintiff but about the conduct of the proceedings by the appropriate authority because in page 3 in the first paragraph it is stated as quoted hereunder :

"In case of M/s. Rohit and Brothers no one has verified the introducer signature, still Shri Forman Ali passed order for opening current account in the name of the said firm."

21. Wherein it is stated on the following page of such charge-sheet being internal page 4 as follows :

"Besides that, Sri Anil Doshi (A-2) has also signed as director in M/s. Narmada Merchants (P.) Ltd. and M/s. Maryada Trexim Pvt. Ltd. whereas in the case of M/s. Naraynon Agency (P.) Ltd. and M/s. Rose Metal and Company, he signed the papers of these companies as Sri Shyam Sunder Sanini and in the case of M/s. Rohit and Brothers, he signed as Sri Hemanta Kumar Goenka, Sri Santosh Kumar Ag"rawal (A-8) has also signed as proprietor in the case of M/s. Balaji Enterprise whereas in the case of M/s. Narmada Merchants (P.) Ltd. and M/s, Maryada Trexim Pvt. Ltd. he signed as one of the directors of these companies."

22. After giving a detailed description even under the seal and signature the Superintendent of the Police, Calcutta of Central Bureau of Investigation that :

"Since no sufficient fund was available with the bank as evident from the cash book dated July 21, 1993, no cash payment was made against the aforesaid three self-cheques totalling Rs. 37 lakhs. Out of these amounts Rs. 24 lakhs, viz., Rs. 15 lakhs to M/s, Everest Enterprise and Rs. 9 lakhs to M/s. Santosh Enterprise pertaining to the Goutam Dhar Group of concerns were transferred whereas the balance amount of Rs. 13 lakhs was shown transferred to the other group of concerns pertaining to Nav Rattan Kedia (A-5), viz., Rs. 89,400 to current account No. 825 (Rohit and Brothers), Rs. 2,09,000 to current account No. 748 (M/s. Sanjoy Fabrics), Rs. 8,71,600 to current account No. 811 (M/s. Wexford Exim (P.) Ltd.), Rs. 60,000 to current account No. 780 (M/s. Egmore Commodities (P.) Ltd.) and Rs. 70,000 to current account No. 834 to M/s, Rohit and Brothers was reduced from Rs. 9,99,025 to Rs. 9,09,625 whereas that of M/s, Sanjoy Fabrics was reduced from Rs 14,99,014.10 to Rs. 12,90,014.10."

23. But surprisingly quoted therein which is very much important for the purpose of coming to conclusion in respect of the suit as follows :

"To justify the aforesaid payment from the current account of M/s. Balaji Enterprise which was much beyond his finance power, Sri Farman Ali (A-1) by abusing his aforesaid position as aforesaid and with the connivance of Sri Anil Doshi (A-2) got prepared some forged papers showing lien on the FDRs of Rs. 50 lakhs which was standing at the said Khidirpore Branch in the joint name of Sri B.L. Agarwal and Sri Santosh Agarwal. On those papers Sri Anil Doshi had forged the signatures of Sri Santosh Agarwal (A-8) as he had done in the case of the aforesaid three cheques which was also confirmed by the hand writing expert, viz., GEQD, Calcutta. The amount of this FDRs which were ten in numbers for Rs. 5 lakhs each was found withdrawn from SB A/C No. 4079 maintained with the said branch in the joint names of said B. L. Agarwal and Santosh Agarwal. The instruments of these FDRs were not taken by the bank for creating lien as required under the bank rules and were found very much in the possession of the account holders."

24. He has again brought the notice of the court in respect of the cross-examination questions Nos. 164-173. In answer to such question the plaintiff being witness contended before this court that he has received the amount from some persons and that is why the cheques were deposited and in respect of the cheque numbers will be reflected in this passbook. When the credit balance was shown in his passbook, he has issued the cheques and the amount was transferred in fixed deposits and a specific answer to question No. 173 he stated that these were transferred from the accounts of Krishna Woollen Industries and Rohit Brothers.

25. Learned counsel has also drawn my attention to questions Nos. 65 to 70 of the examination-in-chief which is in relation to the CBI investigation. It appears from the depositions that the plaintiff went to the CBI office of his own without notice and met with the DSP, Mr. A.K. Shah. He met with him about 10 to 15 times when the three cheques were shown by Mr. Shah to him from which it appears that the same were forged. He then showed him the lien application on which it was also found his signatures were forged. This statement of the witness under the examination-in-chief has a supportive value with the charge-sheet made by the Senior Deputy Superintendent of Police, Central Bureau of Investigation on November 21, 1995, as quoted above. Therefore, since the arguments have been made by the defendant-bank itself in respect of the suspicious conduct of the plaintiff and the answer in the examination-in-chief is supported by the charge-sheet of the Central Bureau of Investigation, dated November 21, 1995, and the document has been disclosed by the plaintiff from which it appears that the appropriate investigation held prima facie about the forgery in respect of the signatures of the fixed deposit as well as the general lien, I do not find any reason why the plaintiff will be harassed by way of withholding money by the bank only on the ground of pendency of the Central Bureau of Investigation alone. If there is no case in respect thereto in the charge-sheet of the Central Bureau of Investigation in the year 1995 itself why the payment on amount under fixed deposits receipts will be withheld by bank even

in the year 2001 is unknown to this court.

26. Learned counsel appearing for the bank contended before this court that no hand writing expert was called for, therefore, the bank did not get any opportunity to verify the hand writings of the signature of the petitioner whether the same are forged or not. I fail to appreciate the stand of the defendant-bank specially on account of calling of hand writing expert. The question of forgery was raised by the plaintiff and accepted prima facie by the Central Bureau of Investigation. Therefore, it is duty incumbent on the part of the defendant to call for a hand writing expert to confront with the same. Moreover, since the bank itself says that the plaintiff should be acquitted first from the CBI proceedings and in the charge-sheet it is clarified as above in respect of hand writing or signature can it not be said that the bank is trying to take a double stand. Either they have to rely upon the report of the CBI or they have to prove their case.

27. It is contended, further, that the plaintiff has stated that he is the director of one of the companies, M/s. Narmada Merchants Pvt. Ltd., co-accused No. 8 herein but such admission to be a director of the company cannot be held responsible for the purpose of realising amount from the bank arising out of different transactions whereunder the plaintiff is the director of a different concern.

28. Under such circumstances, the questions as agitated by the defendant cannot be acceptable in the eye of law. So many questions were asked in the cross-examination being 267 to 274 on different dates about the alleged anomalous statement in respect of the custody of the cheques specially in connection with one Sri Anil Doshi whose name was figuring in the charge-sheet. But I do not find any anomalous statement in respect of Sri Anil Doshi. The witness apprehended about the conduct of such Sri Anil Doshi even in the cross-examination. Therefore, such statements are not giving any suspicion in the mind of the court against him but more establishing the consistent stand of the witness being corroborative with the charge-sheet. Therefore, this is not the proper way to refuse a constituent of the bank from encashing the fixed deposit receipts. Once, the charge-sheet has been given by the Central Bureau of Investigation in the year 1995, there is hardly any scope to take a different stand at the same time by the bank being unsuccessful there since they themselves called upon CBI for the purpose. Some of the aspects are very clear that the fixed deposits are nowhere connected with the alleged complaint and forgery has made by the different persons which is part and parcel of the investigation of the concerned Central Bureau. It is true that such investigation being criminal in nature has no connection and/or binding effect upon a civil proceeding before this court but at the same time it is to be remembered that the reference of the bank is same and similar. However, the civil court has independently evaluated the position. It is further significant, when the general lien is not proved and this account is different from the account of the company any commercial transaction cannot be withheld on account of appropriation as proposed herein. Such

submission is not acceptable at all, otherwise faith and allegiance being the basic structure of commercial transactions will evaporate and the apprehension will step in such shoes to destroy the entire viability.

29. The plaintiff contended that the defendant-bank unequivocally admitted that the fixed deposits are genuine, fixed deposits are matured as such proceeds of the matured fixed deposits were adjusted against the bank's claim being Rs. 11,43,695.56, etc. When the bank itself pleaded for adjustment then it is an admitted position that the amount under the account is clean and genuine. If the bank can adjust the amount then it can be presumed that the bank has taken into account the genuineness of the claim otherwise bank officers could have been held in the CBI proceedings.

30. Therefore, now before the court the remaining question is right of such adjustment alone.

31. The bank has pleaded that it has an overdraft in favour of Balaji Enterprise of which the plaintiff is the proprietor and the dues in such overdraft account of a sum which was purportedly adjusted against the proceeds receivable under the ten fixed deposits standing in the joint names of the plaintiff and proforma defendant. The bank claimed a lien over such ten fixed deposits and produced from the custody of the plaintiff as marked exhibit A collectively. There is no endorsement of such lien. Questions Nos. 110 to 116 of the defendant's witness No. 2 relevant for the purpose are considered by this court. Defendant contended exhibits Nos. 2, 2A, 3, 3A, 4 and 4A being the application-cum-letter against the security of the bank deposits. The agreement for cash credit/overdraft proved that the plaintiff in the name of his proprietary firm Balaji Enterprise opened an overdraft account with the bank and authorised the bank to adjust the debit balance of ten fixed deposits. The plaintiff under question No. 221 categorically denied such statement by saying that the said proprietary concern had no occasion to obtain loan or credit facilities from the bank or at any occasion to make any application of such loan. Moreover, none of such documents are related to the alleged overdraft account and authorisation to bank to adjust debt against the security.

32. It appears from the witness action of Sri Lalit Arora an employee of the regional branch of the bank that he has gone through certain documents being promissory note dated July 21, 1993, an agreement for cash credit and/or overdraft. But no original of the documents has been produced before this court with a plea that the original was lying with the Central Bureau of Investigation for the purpose of enquiry. Therefore, all the documents were marked for identification. These answers were given under questions Nos. 87 and 88 of the examination-in-chief. It appears, the said Sri Lalit Arora gave evidence being an employee in respect of collection of cheques and bills in the Khidirpore Branch of the Bank, Calcutta, in 1992 to 1993. He has also agreed as against the cross-examination of question No. 21 that he deposed in 1994 before the Central Bureau of Investigation. The next witness one Sri Salim Mallick of the bank, who

had taken the charge on July 21, 1993 of work till June, 1998, deposed that exhibits Nos. 2, 2-A, 3, 3-A, 4, 4-A are the documents under the signature of the plaintiff. All the exhibits were objected to and the same were accepted by the court subject to objections which are available from the examination-in-chief being question No. 28 onwards. It is categorically mentioned by the said Sri Mallick as against questions Nos. 84 and 87 that the documents were not executed in his presence. As against question No. 88 he deposed that he has not gone through the charge-sheet as given by the Central Bureau of Investigation against questions Nos. 84, 85 and 88 arising out of the cross-examination. Therefore, one thing is very clear that neither the originals were produced taking the plea that the originals are lying with the Central Bureau of Investigation and the same were not signed before the witnesses. Under the said circumstances, specifically adjudging the merits of such submission side by side the charge-sheet being the marked portion above I cannot come to a definite conclusion at all that the lien was created by the plaintiff in favour of the bank in respect of the fixed deposit receipts at all.

33. However, subsequently originals were placed. I have carefully considered the original documents lying with the Central Bureau of Investigation as produced before this court being exhibits Nos. 3, 3A and 4, 4A. But apparently does not find place as similar and genuine signature if the same are kept side by side with the signature of the plaintiff in the fixed deposit receipts. The originals of documents along with the fixed deposit receipts are all exhibited. I have personally compared and verified the signatures as available in annexure A side by side with annexures 3, 3A and 4, 4A. Under such circumstances, I cannot see any reason to withhold the amount. The plaintiff has relied upon various judgments in support of his contentions but before that learned counsel appearing in support of the plaintiff categorically submitted that from the charge-sheet being exhibit G it is established beyond doubt that the amount of Rs 37 lakhs was withdrawn by forging the signature of the plaintiff in connivance with the bank's then branch manager of the Khidirpore Branch and neither the plaintiff nor the proforma defendant is a beneficiary of the said sum of Rs. 37 lakhs or any part thereof. The bank cannot disprove these findings in the charge-sheet nor able to produce any evidence contrary thereto. The case of forgery is established from annexure G being charge-sheet of the Central Bureau of Investigation. It clearly proved that neither the plaintiff nor the proforma defendant has withdrawn the sum of Rs. 37 lakhs or any part thereof. Therefore, the purported adjustment of Rs. 37 lakhs as against ten fixed deposit receipts is wrong, baseless and liable to be struck down. Since there is no withdrawal of Rs. 37 lakhs by the plaintiff or the proforma defendant, there is no debt due realisable by the bank from the plaintiff. It is well-settled that the bank is liable for payment even under forged cheques because those do not carry any mandate of the withdrawal and in making of such payment the bank cannot take any defence that the constituent was negligent. The plaintiff has very much relied upon a single Bench judgment of this court reported in Mahabir Prasad Bubna Vs.

United Bank of India, , wherein it was held that 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 original contractual mandate, then the bank is liable on contract, notwithstanding the issue of negligence or carelessness. If owing to the negligence 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 between himself and the banker. However, if a cheque book is carelessly left by a customer and a third party utilised it for obtaining payment from the bank, the bank could not put this as a defence to an account for a liquidated claim whereby the bank was called upon to return the money paid out upon the cheques which did not contain the true mandate of the customer. Thus, the banker is bound to honour the cheque duly signed by its customer. Similarly, the bank is bound according to the strict term of the law of contract not to honour any cheque which is not signed by its customer. It would be no defence by 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. The single Bench of this court relied upon a judgment of the Supreme Court of India reported in *Canara Bank Vs. Canara Sales Corporation and Others*, . The Supreme Court has categorically held that unless the bank is able to satisfy the court either by an express condition in the contract with the customer or an unequivocal notification it will not be possible to save the bank from its liability. Whenever a cheque purporting to be by a customer is presented before a bank it carries a mandate to the bank to pay. If a cheque is forged there is no such mandate. The bank can escape liability only if it can establish knowledge of the customer of the forgery in the cheques.

34. In any event this is not the case of contributory negligence. But even if the court visualises so, the court should be guided by the principle laid down under such judgment whereunder it is held that though a bank cannot take a simple defence of the 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 torts to claim for loss or damages suffered by it by reason of the negligence of its customer. An action taken in torts by the bank would, however; raise substantially different issues. 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 per cent, or 60 per cent, 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. But 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.

35. In any event, when the fraudulent activities or forgery by way of criminal investigation has already been established by a charge-sheet by the Central Bureau of Investigation on behalf of bank then such question, if any, in respect of contributory negligence or like manner cannot be applicable in the given situation. Moreover there is no proof of knowledge of the plaintiff about fraud or forgery.

36. These being the position, I do not find any reason as to why I shall not hold in favour of the plaintiff in getting the decree affirmatively thereby, I hold all the issues being issues Nos. 4 and 5 along with issues Nos. 2 and 3 in favour of the plaintiff. Therefore, upon taking the totality of the matter as well as documentary and oral evidence I have no hesitation in my mind that the plaintiff is entitled to a decree in terms of prayer (a) along with the contractual rates of interest on the fixed deposits from time to time as available as per the Reserve Bank guideline till August 1, 1996, as prayed for under the particulars being the last date before the institution of the suit and similar rate of interest from the date of institution of the suit till the date of realisation. Costs assessed at Rs. 10,000. No other decree is passed in connection thereto.

37. Xerox certified copies of this judgment will be supplied to the parties within seven days from the date of putting requisites.

38. All parties are to act on a signed copy of the minutes of the operative part of this judgment on the usual undertaking and subject to satisfaction of the officer of the court in respect as above.