**(2012) 11 SHI CK 0099**

**In the High Court Of Himachal Pradesh**

**Case No :** Civil Suit No. 79 of 2008

Shri Sham Mahajan APPELLANT

Vs

HP State Co-Operative Bank Ltd. RESPONDENT

**Date of Decision :** 05-11-2012

**Acts Referred:**

**Citation :** (2013) 2 ShimLC 603

**Hon'ble Judges :** Sanjay Karol, J

**Bench :** Single Bench

**Advocate :** J.S. Bhogal, with Mr. Parmod Negi, for the Appellant; Bhupender Gupta with Mr. Janesh Gupta, for the Respondent

## Judgement

Sanjay Karol, J.—Plaintiff, as Proprietor, is running his business in the name and style of National Construction Company. As per the averments made in the plaint, plaintiff availed certain facilities of loan from the Taklech Branch (defendant No. 2) of H.P. State Co-operative Bank Ltd.-defendant No. 1. The loan facility was availed only to the extent of Rs. 20,50,000/-. In fact there were two transactions, one pertaining to preparation of bank draft amounting to Rs. 20,00,000/- payable in the name of plaintiff-firm at Chandigarh and another of a sum of Rs. 50,000/- which was transferred to the plaintiff''s Current Account at the said Branch itself. Plaintiff also deposited amounts in the shape of fixed deposit receipts with the said Branch. On 28.9.2007, plaintiff received a letter from defendant No. 2, i.e. Branch Manger of Taklech Branch of defendant No. 1, asking him to confirm the balance of debt of Rs. 46,24,623/- as outstanding against the term loan LABOD No. 27 with the said Branch. Plaintiff immediately refuted the position and vide letter dated 30.9.2007 confirmed that only a sum of Rs. 20,50,000/- stood paid by the Bank to him. On 19.10.2007, plaintiff received statement of accounts with respect to loan amount, so issued by defendant No. 2. In terms of the said statement, it was so discovered that the following entries were made with regard to disbursement of amounts under instructions of the plaintiff:-

 

Plaintiff disputed the same and it was so discovered that the Branch manager posted at the appropriate time when the entries were so made had actually defrauded the bank and wrongly debited the entries towards the aforesaid payments into the account of the plaintiff which amount was actually deducted from the FDRs of the plaintiff. Consequently, plaintiff has filed the instant suit for recovery of Rs. 24,90,000/- which was illegally debited from the FDRs of the plaintiff lying in the same Branch. Rs. 1 lac is claimed on account of harassment caused to the plaintiff and Rs. 1100/- is claimed as expenditure incurred for sending legal notice dated 19.11.2007. As such, on the basis of cause of action which arose between 29.6.2007 and 20.9.2007, plaintiff has filed the instant suit for recovery of the aforesaid amounts.

2. Defendants filed written statement, inter alia, pleading that the suit is bad for non-joinder of necessary parties, it is not properly and legally verified; no legal and enforceable cause of action has arisen and plaintiff is estopped from filing the suit on account of his own acts, deed, conduct and acquiescence. On merits, entries with respect to Rs. 24,90,000/- are admitted to have been made by the Branch Manager and the said sum deducted from the FDRs of the plaintiff lying with the defendant Bank. However, defendants have taken the defence that the amounts were disbursed and debit entries made on the basis of telephonic instructions issued by the plaintiff to Shri V.L. Sanatoo, who was posted as Branch Manager at the relevant time. The fact that the transactions on the basis of telephonic instructions were made as per practice of the Bank is specifically pleaded by the defendants. It is also pleaded that plaintiff and said Shri Sanatoo, acted in collusion and connivance with each other in order to cause loss to the defendant-Bank. Additionally, it is pleaded that defendant-Bank filed FIR against the said Branch Manager and the matter is pending investigation.

3. In the replication, plaintiff clarified that the amount of Rs. 24,90,000/- stood debited out of the FDRs which were lying with the Bank and as per the FIR, plaintiff is not one of the accused persons.

4. On the pleadings of the parties, following issues were framed:-

1. Whether the plaintiff is entitled for the recovery of the amount as alleged? OPP

2. If issue No. 1 is answered in affirmative then plaintiff is entitled for what rate of interest? OPP

3. Whether the plaintiff is entitled to claim damages as alleged? OPP

4. Whether the suit is bad for non-joinder of necessary parties, if so its effect? OPD

5. Whether the plaint has not been verified and the affidavit has not been sworn and attested as per law, if so its effect? OPD

6. Whether the plaintiff has no legal and enforceable cause of action against the defendants, if so its effect? OPD

 

7. Whether the plaintiff is estopped to file and maintain the present suit on account of his own acts, deeds and conduct? OPD.

8. Relief.

5. Heard learned counsel for the parties.

ISSUES No. 1, 2 & 3

6. All these issues are interconnected and interlinked, hence are being decided together. In support of his case, plaintiff examined himself as PW-1 and defendants examined Shri N.D. Bhardwaj as DW-1. Plaintiff (PW-1) has clearly proved that a sum of Rs. 54 lacs was deposited by him with Taklech Branch of defendant No. 1 in the shape of FDR. From the testimony of Shri N.D. Bhardwaj (DW-1) it is also evidently clear that the plaintiff was maintaining a cash credit account with the said Branch under the name of M/s National Construction Company Limited (India). DW-1 has placed on record the computer generated statement of account (Ext.DW-1/A) evidencing only a sum of Rs. 20,50,000/- was disbursed to the plaintiff. He has also proved documents Ext.DW-1/C and to Ext.DW-1/G to establish that Shri V.L. Sanatoo the then Manager of the Branch had credited certain entries in the name of third parties under telephonic instructions issued by the plaintiff. These entries, according to the plaintiff, were wrongly credited as no instructions in writing were given to the bank. This amount comes to Rs. 24,90,000/- and the same was deducted from the FDR lying with the Branch. An attempt was made by the Bank to show that these entries were made on the instructions of the plaintiff but then except for a bald statement of DW-1 there is nothing on record to prove this fact. Shri Sanatoo has not been examined in Court. Also Shri Bhardwaj (DW-1) in his unrebutted testimony has clearly deposed that there is no telephone number of the plaintiff on the account opening form. Most significantly he has admitted that it is not the practice of the Bank to transact business on oral instructions. Defendant Bank is a public sector undertaking. It has its own rules of procedure which do not allow oral transactions and that too of several lacs of rupees. From the testimony of both these witnesses, it is also evidently clear that no doubt FIR (Ext.DW-1/B) was registered against Shri V.L. Sanatoo the then Branch Manager, but then it is also a matter of fact that the plaintiff or his concern is not named as an accomplice. No allegation of fraud/collusion/deceit has been proved against the plaintiff. In fact it has come on record that investigation in the said FIR is complete, in which plaintiff has cooperated and challan is likely to be presented in the Court in near future. The defence taken by the defendant to me does not appear to be plausible. Significantly, in the vouchers Ext.DW-1/C to Ext.DW-1/G at some places there are full signatures of the manager and at some places there are initials. It appears that signatures of Shri Sanatoo, which in any event were not proved through a handwriting expert, were obtained subsequently. Be that as it may be, even unilateral entries of an agent of the Bank cannot be binding on the plaintiff. Factum of those entries was not even communicated to the plaintiff promptly. Plaintiff in his testimony has proved that he does not know Kewal Ram

 

of M/s Kewal Ram and sons or Shri Ram Lal, both Contractors to whose accounts the amount in question was credited. As per the version of Shri N.D. Bhardwaj (DW-1) the then Manager (Shri V.L. Sanatoo) had made unauthorised entries amounting to Rs. 24,90,000/- from the C.C. account of the plaintiff, as such the plaintiff cannot be penalized for the said acts of Shri Sanatoo.

7. Plaintiff has sufficiently proved the fact that a sum of Rs. 24,90,000/- was wrongly debited by the Bank from the Fixed Deposit Receipts deposited by the plaintiff with the Taklech Branch and the said amount was wrongly credited to his C.C. Account. In my considered view, plaintiff is entitled to recover this amount alongwith interest from the dates from which the amount stood debited from his C.C. account.

8. In similar circumstances, the Apex Court in M/s. Hyderabad Commercials Vs. India Bank and others, , has held as under:-

5. Since the basic facts regarding the unauthorized transfer of the disputed amount from the appellant''s account as well as the bank''s liability was admitted, there was no justification for the High Court to direct the appellant to file suit on ground of disputed questions of fact. The respondent bank is an instrumentality of the State and it must function honestly to serve its customers.

6. We, accordingly, allow the appeal, set aside the order of the High Court and direct the Indian Bank to recruit the disputed amount of Rs. 12.95 lakhs to the appellant''s account within three weeks from today alongwith interest if any due on the aforesaid amount. As regards the dispute between the appellant and Respondents No. 6 and 7 is concerned, we express no opinion on the same. The appellant is entitled to its costs from defendant 1.

9. In so far as the plaintiff''s claim for damages of Rs. 1 lac is concerned, there is nothing on record to establish that plaintiff actually suffered damages. Consequently, this prayer of the plaintiff is rejected.

10. With regard to service of legal notice for which plaintiff incurred an amount of Rs. 1100/- stands proved on record that legal notice was served. As such this claim is justified and proved on record.

11. Consequently, Issues No. 1 to 3 are decided in favour of the plaintiff to the extent that plaintiff is entitled to recover Rs. 24,90,000/- alongwith interest. Interest is to be calculated from the dates when the amounts were debited from the account of the plaintiff i.e. 29.6.2007 to 31.7.2007, at the rate on which the Bank would have awarded interest to the plaintiff as per the terms agreed upon between the plaintiff and defendant-Bank at the time and in terms of execution of agreement entered for preparation of the FDRs.

Issues No. 4 and 6

12. Plaintiff had no grievance against Shri V.L. Sanatoo, who was acting as an agent of the defendant-Bank. As such, it was absolutely not necessary for the

 

plaintiff to have arrayed the said person as a party-defendant. In any event, issue is more technical in nature and suit cannot be dismissed on this count. There is privity of contract between the plaintiff and the defendant and the defendant is bound by the acts of its employee (s). A legally enforceable contract had arisen between the parties and more so against the present defendants. As such the issues are decided against the defendants.

Issue No. 5:

13. The suit has been properly verified and sworn and as such the present issue is decided against the defendants.

Issue No. 7:

There is nothing on record to prove the plea of estoppel. Also there is no evidence to establish that the plaintiff''s conduct has been such so as to disentitle himself for the relief claimed for. Issue is decided against the defendants. Relief :

13. In view of my findings on Issues No. 1 to 7, suit of the plaintiff is decreed with costs to the extent that the plaintiff is entitled to recover Rs. 24,90,000/- from the defendants alongwith interest to be calculated from the dates when the amounts were debited from the account of the plaintiff i.e. 29.6.2007 to 31.7.2007, at the rate on which the Bank would have awarded interest to the plaintiff as per the terms agreed upon between the plaintiff and defendant-Bank at the time and in terms of execution of agreement entered for preparation of the FDRs. The plaintiff is also entitled to recover a sum of Rs. 1100/- as costs of the notice.