
(1994) 12 DEL CK 0049
In the Delhi High Court
Case No : Suit No. 768 of 1967

State Bank of India

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 13-12-1994

Acts Referred:

Contract Act, 1872 — Section 72

Negotiable Instruments Act, 1881 (NI) — Section 131

Citation : (1996) 1 BC 251 : (1995) 57 DLT 55

Hon'ble Judges : R.L. Gupta, J

Bench : Single Bench

Advocate : J.S. Arora, for the Appellant;

Judgement

R.P. Gupta, J.

(1) This suit is for recovery of Rs. 80,605.00 against defendant No .1 now (the suit having been withdrawn against defendants 2 to 9 and having been dismissed as such vide order dated 22/4/1988 of this Court). The allegations by the plaintiff are that the defendant No. 1 Bank (Punjab National Bank) sent a cheque for collection. It was Cheque No. OC/16-383575, dated 10/12/1964 for Rs. 80,605.00purporting to be drawn by Land Acquisition Collector, Delhi, in favor of one Durlabh Singh, son of Shyam Singh. It was endorsed to the Bank and it bore endorsement of the Punjab National Bank that payee''s account has been credited. The plaintiff believed the cheque to be genuine and on 29/12/1964 made payment of the cheque to defendant No. 1 (Punjab National Bank), Ajmeri Gate Extension Branch ,Ajmeri Gate, New Delhi. It is asserted that around 18/1/1965, the plaintiff received a letter of that date from Land Acquisition Collector, Delhi, informing thata cheque leaf bearing the aforesaid number of the cheque, among others, had been stolen by somebody. It was found that the cheque involved in this case was not genuine .So the assertion is that the plaintiff under mistake that the cheque was genuine made payment of the amount of the cheque to defendant No. 1. It is asserted that the plaintiff is

entitled to recover the amount from the defendant No. 1 Bank. It is urged that defendants had acted fraudulently as somebody had forged the signature of the Land Acquisition Collector, Delhi, and it was fraudulently drawn in favor of Durlabh Singh. The cause of action is sought from the date of payment of the cheque. The suit was filed on 11/12/1967.

(2) The Punjab National Bank, defendant No. 1, has contested the suit urging that the plaint does not disclose any cause of action against it. It has been asserted that plaintiff is the drawee bank who had been keeping account of the Land Acquisition Collector, Delhi, and who had specimen signatures of the Land Acquisition Collector, Delhi. The plaintiff had honoured and encased the cheque dated 10/12/1964 and the plaintiff itself was in a position to check up the genuineness or otherwise of the cheque and was responsible for payment of the cheque and so there is no cause of action against defendant No. 1 Bank. It is urged that defendant No. 1 had no information nor any source to check up the genuineness of the cheque in question and so it is not liable for the alleged fraud. It was urged that defendant No. 1 Bank has already made payment of the amount received by it to its principal. It is asserted that plaintiff itself was negligent in not checking up the alleged forgery in the cheque and when it cleared and encased the cheque it cannot blame the collecting bank. Principal of estoppel is pleaded against the plaintiff. It was urged that defendant No. 1 (Punjab National Bank) has only a sum of Rs. 55.00 left out of the amount of the cheque with them and the rest has been paid to its principal after collecting the same from the plaintiff-Bank. It is urged that defendant No. 1 cannot be held liable for the amount paid by it to its principal as whose agent it collected the cheque.. even if the cheque is shown to be forged. It has been urged that plaintiff has no locus standi to sue. It is urged that Land Acquisition Collector, Delhi, alone, being the owner of the cheque, could sue for recovery of this money. In any case, it is urged that Land Acquisition Collector, Delhi, who maintains current account with the plaintiff-Bank, as also the Union of India and Delhi Administration are necessary parties or at least proforma parties to the suit. So it is urged that suit is bad for nonjoinder of parties. It is asserted that suit is not filed by a duly authorized person. It is urged that defendant No. 1 Bank did not receive any amount for itself from the plaintiff-Bank. It was only by way of collection for its principal. The defendant No. 1 was only collecting agent. It is urged that since the money was withdrawn by the depositor of the cheque, defendant No. 1 Bank cannot be held responsible for the same .

(3) I need not note the pleas raised by defendants 2 to 9 or their legal representatives as the suit has already been withdrawn and dismissed against them as withdrawn .

(4) In replication to the written statement of defendant No. 1 Bank, the plaintiff has reiterated its assertions raised in the plaint and denied its negligence in checking up the alleged forgery in the cheque. The plea of estoppel was totally denied as arising in law or fact. It was urged that liability of defendant No. 1

arose u/s 72 of the Indian Contract Act as being a statutory liability. It was not accepted that defendant No. 1 Bank has passed on the money to its principal. In any case, it was urged that defendant No. 1 is liable to pay the money to plaintiff as the cheque was forged one and defendant No. 1 should have been careful in not presenting a forged cheque for collection. It was denied that Union of India or the Land Acquisition Collector, Delhi Administration, are necessary or proforma parties to the suit.

(5) The following issues were framed on 5/5/1970:-

1. Is the plaintiff entitled to recover any amount from defendant no. 1 under the provisions of Section 72 of the Indian Contract Act, 1872? If so, to what amount is the plaintiff entitled and on what basis? 2. Is the plaintiff entitled to the recovery of Rs. 80,605.00 from the rest of the defendants also in terms of the allegations contained in the plaint? 3. To what other relief, if any, is the plaintiff entitled and against whom?

(Under this issue, the plaintiff will be entitled to prove the case against defendant No. 1 on allegations other than the allegations that the said defendant is liable in view of the provisions of Section 72 of the Contract Act, This he will be doing within the ambit of the allegations made in the plaint.)

(6) This Court had observed at the time of framing of issues that in the Issue No. 3, the plaintiff will be entitled to prove the case against defendant No. 1 on allegations other than the allegation that defendant is liable in view of the provisions of Section 72 of the Indian Contract Act also, but this will be done within the ambit of the allegations made in the plaint. It was observed that defendant No. 1 will be at liberty to prove the contentions raised in the written statement regarding Land Acquisition Collector, Delhi, only, having the necessary cause of action or locus standi to file the suit.

(7) I may note here that so far as issue No. 2 is concerned, it does not survive as it arose out of the pleadings of defendants 2 to 9 or their successors and the suit against them has already been withdrawn and dismissed as such a claim against them has been given up. So I am left to decide issue Nos. 1 and 3 with the observations of the Court noted above.

(8) In evidence, the plaintiff examined Mohd. Mustafa, who was the Land Acquisition Collector, Delhi, at the time of drawing of the cheque. The next statement is that of Hardit Singh, retired officer of the State Bank of India. Mr. Mustafa has asserted that the signature on the cheque Ex.P/A was never signed by him and the signature at point marked "X" is not his signature although it purports as if it was signed by him. It is also urged that the seal under the signature purporting to be that of the Land Acquisition Collector, Delhi at mark "Y" is not the seal of the Land Acquisition Collector. So he is proving the forgery of the signature and the forgery of the seal on the cheque. It is also in his evidence that some cheque leaves from a cheque book had been stolen, including the leaf of this cheque. As soon as he came to know about it, he wrote to the

agent State Bank of India, Tis Hazari, Delhi, vide letter Ex. P/C and the Bank wrote back that the cheque Ex. P/A had already been encashed.

(9) Hardit Singh was the Officer of the State Bank of India, Tis Hazari, at that time. He said that Land Acquisition Collector had maintained an account with the plaintiff-Bank during the period 1963 to 1967. He also proved that cheque in question was presented to the Tis Hazari branch of the plaintiff-Bank. It was received for clearing from the Punjab National Bank and it was passed by U.S. Bhargava, the Accountant of the Bank. Mr. Bhargava was dead by the time the evidence of this witness was being recorded. The amount of the cheque was paid on 29/12/1964. This witness identifies the initials of U.S. Bhargava, Accountant. the amount was paid through clearing to defendant No. 1. He also narrated that amount of this cheque was claimed by Land Acquisition Collector from the State Bank of India and they had to pay it in the year 1967 by raising a debit to the suspense account and by giving a credit to the Land Acquisition Collector.

(10) Defendant No. 1 examined one witness M.L. Kumariya, Sr. Manager of Asaf Ali Road branch of the Bank. He produced copy of general power of attorney as DI-W1/I and statement of account of Durlabh Singh was produced as DI-W2/2A. The account showed a balance of Rs. 120.37 p. only when this witness was making statement on 22/4/1988. There was no entry after 31/12/1987. He asserts that his Bank acted only as a collecting agent in respect of the cheque and the amount was credited to the account of Durlabh Singh on 29/12/1964.

(11) The facts are not disputed in this case. The forgery of the cheque, the fact that it was presented to plaintiff by defendant No. 1 as collecting agent, the fact that payment was made to defendant No. 1 for its principal, are fully established by statement of the witnesses. The only question is whether the plaintiff is entitled to recover the amount from defendant No. 1 who was the collecting agent.

(12) The assertion of the learned Counsel for plaintiff is that this payment was made by plaintiff to defendant No. 1 under a mistaken belief that it was a genuine cheque which was found to be not genuine. So it is urged that the plaintiff is entitled to recover back the amount from the defendant No. 1 to whom the money was passed on and defendant No. 1 may have its own remedies against its principal.

(13) Section 72 of the Indian Contract Act, 1872, is as follows:

"72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion- A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

(14) The contention of the plaintiff's Counsel is that the cheque purporting to have been issued by the Land Acquisition Collector was in fact not so issued by him and, Therefore, it was not a cheque, strictly speaking, within the definition of

"cheque" in Negotiable Instruments Act. According to him, a cheque is one document which is in fact signed by its drawer and if a piece of paper bears forged signature of the drawer and is in the proforma of a cheque, it will not be a cheque. For this, he puts reliance on the observations of the Supreme Court of India in *Bihta Co-operative Development Cane Marketing Union Ltd., and Another Vs. The Bank of Bihar and Others*, . In Para (11) of this report, the Apex Court observed "if the signatures on the cheque or at least that of one of the joint signatories to the cheque are not or is not genuine, there is no mandate on the Bank to pay and the question of negligence on the part of the customer, such as, leaving the cheque book carelessly so that a third party could easily get hold of it would afford no defense to the Bank". Their Lordships also noticed what is a "cheque", according to Halsbury's Law of England (3rd Edition), Volume II, Article 380, which is as under:

"A document in cheque form to which the customer's name as drawer is forged or placed thereon without authority is not a cheque, but a mere nullity. Unless the banker can establish adoption or estoppel, he cannot debit the customer with any payment made on such document."

(15) That suit, however, was against a drawee Bank by the Society whose cheque had been stolen and signatures of one of the authorised signatories had been forged. The Bank had come forward with a plea of negligence of the Society or its officers. While dealing with this question, their Lordships held that since one of the signatures of the authorised signatories were forged so that there never was any mandate by the customer at all to the banker, the question of negligence of the customer in between the signature and the presentation of the cheque never arose. Their Lordships held that the circumstances and the encashment of the cheque show that the banker was negligent and some of its officers were fraudulent right from the very beginning. The cheque was in loose form returned by an ex-constituent and not from any regular cheque book of the customer.

(16) This authority, of course, was not dealing with liabilities between the drawee Bank or the paying Bank and the collecting Bank, but it had noted with approval the observations of Halsbury as to what is a cheque.

(17) As per Section 6 of the Negotiable Instruments Act: "a cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

(18) Section 5 of the aforesaid Act defines "bill of exchange" as "an instrument in writing containing an unconditional order signed by the maker, and directing a certain person to pay certain sum of money only to, or to the order of a certain person or to the bearer of the instrument."

(19) So a cheque is a bill of exchange giving directions of payment to a banker and not expressed to be payable otherwise than on demand.

(20) When this meaning of the cheque is understood in the light of the observations of the Apex Court noted in the above pronouncement, it becomes clear that a document which is in cheque form but on which the signature of the drawer is forged, has in fact no mandate from the drawer. This is, Therefore, not a "cheque" in the strict sense. When such a document is forwarded by a collecting Bank to a paying Bank, and the paying Bank makes payment to the collecting Bank, who in turn passes it on to its principal who had put in the forged cheque, the question is what are the rights between the payer Bank and the collecting Bank. That is the precise question involved in this case.

(21) The collecting bank, viz., defendant No. 1 has raised a plea of estoppel on the ground of negligence of the drawee Bank in encashing this cheque and not detecting the forgery on the plea that they had all the means and material with them to find out if signatures of the Land Acquisition Collector were genuine or not, and secondly because this collecting Bank had already paid the money to its principal as whose agent it collected the cheque, even though it proved to be a forged one later on.

(22) Learned Counsel for the plaintiff has brought to my notice a judgment of the Division Bench of the Madras High Court *Indian Bank Vs. Catholic Syrian Bank Ltd.*, . In this case, a customer of the appellant-Bank presented a forged draft of Rs. 29,000.00 which was purporting to be drawn on the respondent-Bank for collection. The appellant-Bank forwarded this forged draft to the respondent-Bank for collection. The money was collected as the respondent-bank did not suspect the forgery. However, about 8 days later, the respondent-Bank learnt of the forgery and it informed the appellant-Bank at once, but by then the customer had withdrawn the amount. The respondent-Bank then sued the appellant-Bank for Rs. 29,000.00 on the ground that the appellant had been negligent while opening a current account in the name of its customer and by reasons of its negligence and want of good faith, the forged draft had come to be wrongly converted.

(23) It may be noticed that the nature of forgery was that one branch of respondent-Bank had issued a draft of Rs. 20.00 in favor of a customer. On this genuine draft, a forgery was made so as to make it a draft for Rs. 29,000.00. the forgery was so skillfully made that there was no suspicion on the face of the draft and unless it was looked upon with a suspicious eye, there was nothing wrong on the fact of it.

(24) The appellant-Bank pleaded that it had exercised due diligence and there was no negligence on its part as a collecting Bank and it also sought protection under the provisions of Sections 131 and 131(A) of the Negotiable Instruments Act.

(25) The Division Bench held under the circumstances of the case that the Bank opening the account could not be considered to have acted without negligence even if it might have acted in good faith. Consequently, the collecting Bank was

not entitled to benefit of Sections 131 and 131(A) of the Negotiable Instruments Act they also observed that in such a case the Bank which honoured the draft could not be said to be guilty of "contributory negligence" merely because it failed to make enquiries from its branch which issued the draft before the same was cleared and the amount thereof was credited to the account of the new customer and he withdrew it .

(26) Sections 131 and 131(A) of the Negotiable Instruments Act, 1881, may be noted at this stage as they deal with the protection available to collecting Banks. These are as under:

"SEC.131A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.S. 131(A)-The provisions of this Chapter shall apply to any draft, as defined in Section 85A, as if the draft were a cheque."

(27) The wording of Section 131 shows that one of the conditions for availability of protection to the collecting Bank is "in case the title to the cheque proves defective .Prima facie, it will not apply when "cheque" itself is forged. Forgery is not the same thing as "dispute about title of cheque".

(28) One more judgment of a Division Bench of Madras High Court has been brought to my notice by the learned Counsel for the plaintiff. It is Bharat Bank Ltd., Madras Vs. Kishinchand Chellaram, , Respondent. In this case, dealing with defense of a collecting Bank based on Section 131 of the Negotiable Instruments Act, the Division Bench observed:

"WHEN in an action in conversion a defense is raised u/s 131 the primary question for determination is whether in the matter of realisation of the cheque the collecting Bank had acted without negligence - Negligence not merely at the stage of encashment but at the prior stages from the receipt of the cheque in question. The question whether the Bank had acted with negligence in the opening of the account will be relevant u/s 131 to this extent that if the opening of the account and the deposit of the cheque are really part of one scheme as where the account itself is opened with the cheque in question or where it is put into the account so shortly after the opening of the account as to lead to the inference that it is part of it, then negligence in the matter of opening the account must be treated as negligence in the matter of realisation of the cheque. The question as to how far the two stages can be regarded as so intimately associated as to be considered as one transaction is a question of fact "

(29) In the present case, the signature of the drawer on the cheque being forged, firstly it could not fall within the category of "cheque" in strict sense, and secondly, the dispute in the present case is not as to the title of the cheque, but it arises out of fraud played by forgery of drawer's signature. There was a false representation that it was a valid cheque duly signed by the drawer who in this

case purported to be the Land Acquisition Collector. This misrepresentation appeared from the face of the document which purported to be a cheque. The drawee Bank was deceived and its concerned officers could not detect the forgery. Does it mean that the collecting Bank is protected because the drawee Bank paid? The Division Bench authority of Madras High Court (supra) gives the answer in the negative.

(30) In the facts and the circumstances of the case before me, the account was opened on 24/12/1964 and on 26/12/1964, this cheque for a huge amount of Rs.80,605 / - was deposited. the value of Rs. 80,000.00 in the year 1964 has to be imagined to infer what care was needed for the Bank which opened the account and which was accepting the cheque for collection. The money was received on 29/12/1964 and it was withdrawn between 1/1/1965 to 11/1/1965. There was not an existing account as of old but a new account. The defendant Bank still was not put to caution and did not enquire who it was that was rushing with deposit of such cheque and withdrawal of the same within a few days. In the written statement of the defendant Bank, it does not even disclose the identity of the client who opened the account with defendant No. 1, the circumstances leading to opening of the account, the circumstances of deposit of the cheque and withdrawal of its entire money.

(31) There is no accepted rule of law nor principle of equity or estoppel that by making payment of a cheque the drawee Bank is deemed to have made a representation to the collecting Bank that the cheque is genuine. It will, at the most, appear to be an acceptance of fact that on the face of it or prima facie there is no suspicious circumstance appearing on the face of the cheque. When a cheque is passed on by the collecting Bank to a drawee Bank, the drawee Bank can expect that the collecting Bank has ensured itself about the genuineness of the customer and that there are no suspicious circumstances preceding deposit of cheque and if any suspicious circumstances arise about withdrawal of the amount, the collecting Bank will act with due caution .

(32) Such matters have arisen in a number of cases before the British as well as Common Wealth Courts, also. The matters have been dealt with in various ways by the British Courts. Some have stressed the principle of estoppel considering that the payment by the drawee Bank amounts to a representation on the genuineness of the cheque and, Therefore, when the collecting Bank pays off to the customer, it acts to its detriment on the representation of the payee Bank and so the principle of estoppel is applied. In other sets of cases, the Courts have leaned towards necessity of caution by the collecting Bank and have not accepted the reasoning that a payment by drawee bank amounts to a representation of genuineness of the drawer's signature on the cheque. In those cases, the plea of estoppel was rebuffed and the circumstances surrounding opening of the account, the deposit of the cheque or draft, its collection and its payment were taken into consideration to draw inference whether the collecting Bank was acting with due diligence or was negligent. All these cases are based

on general principles of equity and justice and not on any statutory provisions of law.

(33) Learned Counsel for plaintiff has cited before me one such judgment reported as (1974) 3 All E.R. 834 titled National Westminster Bank Ltd. v. Barclays Bank International Ltd. b Another. In this case, after reviewing the various preceding judgments, the Queen's Bench Division held:

"THE mere fact that a banker had honoured a cheque on which his customer's signature had been undetectably forged did not carry with it an implied representation by the banker to the payee that the signature was genuine. Furthermore ,it was immaterial that the cheque had been presented for special collection ,for that circumstance did not as such imply anything sinister or suspicious which should put the paying Bank on guard. Accordingly there was no implied representation by the plaintiffs which could lay the foundation for an estoppel against them and, Therefore, there was no bar to the plaintiffs "right to recover the money as having been paid under a mistake of fact."

(34) In this case, one "B", a resident of Nigeria had an account with the plaintiff Bank in their London branch and had a cheque book issued by that branch. One blank cheque was stolen from this cheque book, unknown to "B". One Ismail, who was defendant No. 2, was given a cheque for 8000 Pounds Sterling by an intermediary. This happened to be the same cheque which had been stolen from the cheque book of "B". Ismail had received it in good faith. However, B's signature had been forged on it by somebody. The forgery was undetectable except to an expert graphologist looking with prior suspicion. Ismail, the second defendant, sent the cheque to London for collection. In fact Ismail, although a successful businessman, was moving his assets from Nigeria to London because of the prevailing civil war situations in Nigeria and for that purpose for the British Pounds, black market price had to be paid in Nigerian Pounds which Ismail had agreed to pay to the intermediary if and when the cheque was collected. Ismail sent this cheque to his Bank in London .This Bank is the first defendant, i.e., Barclays Bank International Ltd. It was deposited with a request for special clearance and for advice immediately if the cheque is honoured. The cheque was presented to the plaintiff-Bank for special collection through the defendant No. 1 Bank. The plaintiff-Bank honoured the cheque as there was no reason to suspect that it was not a genuine cheque and "B" was known to the plaintiff-Bank as a customer of integrity and the plaintiff-Bank's branch was holding ample collateral security to cover B's indebtedness. Thus Barclays Bank informed Ismail, the second defendant, that the cheque had been honoured and his account has been credited with the amount. Relying on this information ,the second defendant Ismail paid the black market price in Nigerian Pounds ,i.e., 10400 Nigerian Pounds, to intermediary. About two weeks later, "B"learnt of the payment and informed the plaintiff-Bank that the cheque was a forgery. The plaintiff-Bank then sued the defendant No. 1 Bank as well as Ismail as defendant No .2 for recovery of 8000 Pounds Sterling as "money paid on mistake of fact. Ismail, the second

defendant, contended that the plaintiff was estopped from making the claim since by honouring the cheque the plaintiff had represented that it was genuine and in reliance of that representation, he had acted to his detriment.

(35) With the observations noted at the earlier stage of reference to this judgment, Kerr, J. sitting in Queen's Bench Division negated the plea of Ismail that the paying Bank was estopped from recovering the amount from him or from the collecting Bank because Ismail paid the money to the intermediary after the cheque had been honoured and if the cheque had not been honoured he would not have paid the price to intermediary and thus he acted to his detriment and that the payment made by the plaintiff-Bank amounted to a representation that the cheque was genuine. All these contentions were negated by the Bench which held that the payment was made under mistake of fact. In this case, the amount of 8000 Pounds Sterling was still in the account of Ismail held by defendant No. 1 Bank and had not gone out of the control of the account. Kerr, J. delivering the judgment, had observed that the common Aphorism that a banker is under duty to know his customer's signature is in fact incorrect even as between the banker and his customer. The principle is simply that a banker cannot debit his customer's account on the basis of forged signatures since he has in that event no mandate from the customer for doing so. His Lordship dealt with a number of earlier authorities, including the judgment in *Price v. Neal*; (1762) 3 Burr 1354, and *London & River Plate Bank Ltd. v. Bank of Liverpool Ltd.*, (1896) 1 Qb 7, and observed that the observations in these pronouncements cannot be treated as Authority for the broad proposition that merely by paying a wholly forged bill or cheque without negligence, an exporter or banker is estopped from recovering the money because he is thereby deemed to have represented the genuineness of the drawer's signature.

(36) Referring to various other authorities of Privy Council and Supreme Court in various cases, his Lordship observed: "none of the various ratios decidendican, however, in my view be taken even as persuasive authority for the broad proposition that merely by honouring a forged cheque without negligence the paying Bank impliedly represents to the payee that the signature is genuine so as to bar any right of recovery from him."

(37) A Judgment of the Supreme Court of Ceylon in *Imperial Bank of India v. Abeyesinghe* -(1927) 29 CNlr 257, was referred and discussed by Kerr, J. In that case, the Supreme Court of Ceylon observed that a cheque on which signatures were forged was not a cheque at all and further that the proposition that a Bank is bound to know its customer's signatures may be good as between the Bank and its customer but in the absence of any negligence in actually honouring the signature there was no duty or obligation towards a third party. It was also observed that the contention that "by paying the money in ordinary course to the person whose name appeared as payee the Bank must be taken to have represented to him that the document was genuine, was unacceptable". Their Lordships further observed In that case that the Bank was induced to part

with the money to the fraudulent client not so much in reliance on the cheque having been honoured as by reasons of fraud which had been practiced on him. Then dealing with the equities between the paying Bank (plaintiff) and the recipient Bank (defendant), their Lordships observed: ""If it were necessary to decide this case by applying the test of which of two innocent parties had enabled a third party to cause loss it seems to me that the(defendant) must bear the responsibility".

(38) One more argument before Justice Kerr was that the cheque had been given for special collection and, Therefore, it should have put the paying Bank on caution. His Lordship discussed the surrounding circumstances and observed: "If this is correct in general then I do not think that special collection as such imply anything sinister or suspicious which itself should put the paying bank on guard". In fact his Lordship observed that the fact that the cheque was put in for special collection should have put the collecting Bank on guard and the paying Bank could rely on the fact that the collecting was forwarding the cheque for special collection. The doubts ,if any, should arise in the mind of the collecting Bank and not in the mind of the paying Bank.

(39) According to this observation, the end result was that the claim of the plaintiff-Bank was decreed against the collecting Bank as well as Ismail, defendant No .2.

(40) At this stage, it would be appropriate to note a pronouncement of the Supreme Court of India regarding rights arising in respect of payments made under mistake of fact or even under mistake of law, under the provisions of Section 72 of the Indian Contract Act. The Apex Court in (1959) Scr 1350 titled Sales Tax Officer, Banaras & Others v. Kanhiya Lal Mukund Lal Saraf, held that the term" mistake "in Section 72 of the Indian Contract Act comprises within its code a mistake of law as well as a mistake of fact and that under that Section a party is entitled to recover money paid by mistake or under coercion, and if it is established that the payment, even though it be of tax, has been made by the party labouring under mistake of law, the party receiving the money is bound to return it though it might have been paid voluntarily subject, however, to questions of estoppel, waiver, limitation or the like.

(41) It was further observed that where there is a clear and unambiguous provision of law which entitles a party to the relief claimed by him, equitable considerations cannot be imported and, in the instant case, the fact, that the Government had not retained the moneys paid by the respondent but it spent them away in the ordinary course of business of the State, would not make any difference, and under the plain terms of Section 72 of the Act, the respondent was entitled to recover the amount.

(42) In this case, the facts were that the respondent firm paid sales tax in respect of its forward transactions in pursuance of assessment orders passed by the Sales Tax Officer for the year 1949-51, but in 1952 the Allahabad High Court

having held in *M/s. Budh Parkash Jai Parkash v. Sales Tax Officer, Kanpur* that the levy of sales tax on forward transactions was ultra vires, and the Supreme Court having confirmed this finding of law, the respondent applied for refund of the amount paid, by a writ petition under Article 226 of the Constitution of India. It was contended for the Sales Tax authority that the respondent was not entitled to a refund because: (1) the amounts in dispute were paid by the respondents under a mistake of law and were, therefore, irrecoverable; (2) the payments were in discharge of the liability under the Sales Tax Act and were voluntary payment without protest; and (3) inasmuch as the moneys which had been received by the Government had not been retained but had been spent away by it, the respondent was disentitled to recover the said amount. It was on these facts and in the light of these objections against a claim that the Apex Court gave the above findings on questions of law involved. The claim of the respondent firm was thus allowed.

(43) Their Lordships of the Supreme Court in this case observed that at the time when the firm deposited Sales Tax under the U.P. Sales Tax Act and the relevant Rules, both the parties, i.e., the firm as well as the department, were labouring under a mistake of law. The legal position as established later on by the decision of Allahabad High Court and subsequently confirmed by the Supreme Court was not known to the parties at the relevant date. This mistake of law became apparent only on 3/5/1994 when the decision of the Supreme Court confirmed the decision of Allahabad High Court and on that position being established the firm became entitled to recover back those amounts which had been paid by mistake of law. Their Lordships observed that there was nothing in the circumstances of the case to raise any estoppel against the respondents nor would the fact that the payments were made in discharge of a tax liability come within the dictum of the Privy Council. It was held that voluntary payment on such tax liability was not by itself enough to preclude the respondents from recovering the said amounts once it was established that the payments were made under mistake of law.

(44) On the question of estoppel, their Lordships observed as under:

"whether the principle of estoppel applies or there are circumstances dependant upon the transaction, which disentitled the respondents to recover back the moneys, depends upon the facts and circumstances of each case. No question of estoppel can ever arise where both the parties, as in the present case, are labouring under mistake of law and one party is not more to blame than the other. Estoppel arises only when the plaintiff by his acts or conduct makes a representation to the defendant of a certain state of facts which is acted upon by the defendant to his detriment, it is only then that the plaintiff is stopped from setting up a different state of facts. Even if this position can be availed of whether representation is in regard to position in law, no such occasion arises when the mistake of law is common to both the parties."

(45) The position of law which emerges from a review of the various

pronouncements noticed above may be stated as under:

(I) A person who makes payment to another under a mistake of fact or under a mistake of law has a right to recover back the same from the person to whom he pays unless that the rule of estoppel operates against the payer. (ii) When the person paying and the person collecting are both acting under a mistake of fact or mistake of law then rule of estoppel is ordinarily not applicable against the payer. (iii) In case there is a document which purports to be a cheque but on which the signature of the drawer is forged, it does not have a mandate of the drawer having account in the Bank and, therefore, it does not fall strictly within the definition of cheque u/s 6 of the Negotiable Instruments Act. (iv) Such a forged cheque, when it is passed on for collection through a collecting Bank by the person knowing it to be forged (but the collecting Bank not knowing it to be forged and passing it on for collection in good faith in ordinary course of its business of banking and is paid by the drawee Bank, that payment does not amount to a representation by the paying Bank that the signatures on the cheque are genuine signatures of the drawer, unless the surrounding circumstances show that their effect was such a representation made by the drawee Bank or paying Bank to the collecting Bank. (v) The collecting Bank in cases of cheques or drafts, has to act with due care and caution. It has to be careful as to who is depositing a cheque or draft of a huge amount and whether it is in ordinary course of the depositor's business to deposit such huge amounts by cheques or drafts and whether such deposit has been made within a few days of the opening of the account and the amount after collection is sought to be withdrawn soon after the collection so as to make all these acts of opening the account, deposit of draft or cheque and withdrawal as part of one scheme. In such circumstances, the collecting Bank is put to inquiry because of the necessity of caution as to the genuineness of the cheque as well as the genuineness of the parties involved and the source of the cheque. If they do not make such inquiries, inference of negligence is to arise against them but it will depend on facts and circumstances of each case. (vi) The mere fact that the collecting Bank has made a payment to its customer who deposited the forged cheque does not raise an estoppel against paying Bank if later on it is found that the cheque is forged. The collecting Bank cannot escape its liability of returning the money, so collected, to the paying Bank. The collecting bank may certainly have its remedies against its clients for indemnification.

(46) Reverting to the facts of the case in hand, the account in this case was opened in the name of one Durlab Singh, Zamindar and land lord of Kali Masjid, Turkman Gate on 24/12/64 by deposit of cash of Rs. 300.00. It was Account No. 6048. A cheque book bearing twenty cheques, Nos. 841441 to 841460 was issued on 24/12/64. Then on 26/12/64, Rs. 200.00 were withdrawn by a self cheque No. 841441. The forged cheque in question was deposited on 26/12/1964. On 29/12/64 the present cheque of Rs. 80605, was collected through clearance. The cheque was dated 10/12/64 in the name of Durlab Singh, son of Sham Singh. Exhibit P-D is the photocopy of that Cheque No. of

383575. The account opening form, copy of which is Ex.PW5/3 on the file, shows that the account was introduced by one Laxmi assigning in Urdu as introducer and shown to be having S.F. Account No. 747 at Asafali Road branch of Punjab National Bank. Then the withdrawals after collection of this cheque on 29/12/64 were started from 1/1/65 onwards in Installments of Rs.10,000.00 per day on 1st, 2nd, 4th, 6th, 7th, 8th and 11/01/1965. On 2/1/65, infact, two cheques, one of Rs. 10,000.00 and another of Rs. 8,000.00 in the name of "self" were drawn and money was taken. On 13/1/65 a self cheque of Rs. 6500.00 was drawn and money taken. That put the balance of Rs. 55.00 in this account on 13/1/65. Thus every day about Rs. 10,000.00 or more, was being withdrawn. The evidence of DW1, M.L. Kumaria is that K.C. Berry was the Manager at the time of opening of the account of Durlabh Singh and that Laxman Dass had introduced Durlabh Singh. This witness does not know if any enquiry was made with regard to antecedents of Laxman Dass.

(47) So this is the state of evidence and this was the state of incidents surrounding the transaction of opening the account, deposit of forged cheque and withdrawal of money. A person who was not an earlier account holder had deposited a cheque of Rs. 80,000.00 and odd. Of course it was a cheque purporting to be issued by Land Acquisition Collector. He was introduced by one Laxman Dass, Saving Fund Account holder about whose antecedents nothing has been disclosed in the evidence. There is no evidence that any enquiry was made then or at the time when the withdrawals were being allowed. The opening of account, the deposit and the withdrawals, thus appear to be so connected in terms of the timings that there is necessary inference that they are part of some transaction of fraud. The Punjab National Bank was necessarily, therefore, obliged to make enquiries while the withdrawal was being continued as to whether this Durlabh Singh was a genuine person and whether no suspicion was involved in the entire transactions.

(48) The Punjab National Bank officers dealing with the opening of this account and the collection of cheques and its payment, did not care to be cautious and dealt with the whole affair as a routine with closed eyes. It was a forged cheque and, therefore, there was no mandate by the Land Acquisition Collector to pay the amount. It is not one of those cases where the cheque was signed by the drawer himself but some other forgery in the amount etc. was involved. In fact, even in that type of cases one of which came before the Madras High Court in Indian Bank Vs. Catholic Syrian Bank Ltd., , the right of "paying Bank" to recover from the defendant collecting Bank was upheld. In that case, the amount of Rs. 20.00 was turned into Rs.29,000.00 by forgery. In the case before me, it was a stolen cheque from the cheque book of Land Acquisition Collector. So the cheque proforma was genuine but everything else was forged. It was not a "cheque" in law. On a consideration of the surrounding circumstances, there was reason for the collecting branch of Punjab National Bank to be cautious. They exhibited no caution in their dealings with the so called Durlabh Singh. The Land Acquisition Collector had informed about the cheque being stolen on 18/1/64 itself, while the

last withdrawal was made by 13/1/64, as already seen. There is nothing on record to suggest that the officers of the State Bank of India were themselves extremely negligent in not detecting what they could easily detect by the look at the cheque itself. They made the payment under mistake of fact that the cheque was genuine. It does not amount to representation on their part that it was a genuinely signed cheque. Since it was not a "cheque", the protection u/s 131 Negotiable Instruments Act is not available to the collecting Bank, defendant No.1 (Punjab National Bank). The mere fact that Punjab National Bank disbursed the money to its principal does not give any protection to it, as regards the rights of plaintiff. State Bank of India.

(49) At this stage, I may note that the locus standi of the State Bank of India arises to file its claim from the fact of payment under mistake. The amount was paid from the account of Land Acquisition Collector, which the State Bank of India had to reimburse. There is evidence of officer of State Bank of India that they had to make payments of this amount of Rs. 80,605.00 to Account of Land Acquisition Collector, Delhi. So, the plaintiff has a right to sue the defendant No. 1 who is the collecting Bank, without impleading Land Acquisition Collector or the Union of India.

(50) The net result of my above discussion is that the plaintiff is entitled to succeed in its claim of the amount of Rs. 80,605.00 against defendant No.1. plaintiff has claimed interest @ 6% p.a., which is justified. Defendant No.1 is liable to pay the same till the recovery of the amount. The principle of estoppel does not apply on the facts and circumstances of this case. I decide these issues accordingly in favor of the plaintiff and against defendant No.1.

(51) The net result is that the plaintiff succeeds in the suit for recovery of Rs. 80,605.00, which is decreed with interest @ 6% from the date, of the date of the suit, i.e. 28/11/67 up to date of recovery. Earlier interest has not been claimed in the suit. The defendant shall pay cost of the plaintiff also. A decree be drawn accordingly. File be consigned to record room.