
(1975) 03 BOM CK 0003

In the Bombay High Court

Case No : Civil Revision Application No. 31 of 1968

Tukaram Bapuji Nikam

APPELLANT

Vs

Belgaum Bank Ltd.

RESPONDENT

Date of Decision : 14-03-1975

Acts Referred:

Negotiable Instruments Act, 1881 (NI) — Section 10, 85

Citation : (1977) 79 BOMLR 419 : (1979) 49 CompCas 937

Hon'ble Judges : Naik, J;J.R. Vimadalal, J

Bench : Division Bench

Advocate : A.G. Gadangaonkar, for the Appellant; V.K. Joshi, for the Respondent

Judgement

Vimadalal, J.—This is a civil, revision application filed by the original plaintiff to set aside the order of the learned Civil Judge, Senior Division, Kolhapur, dismissing the plaintiff's suit with costs. The facts necessary for the purpose of disposing of this revision application are simple, but it raises an interesting point of law of some importance to the business community, which, as far as the learned advocates before us were able to find out is not covered by any decision of this court. One Dundage, who carried on business at Shankeshwar, had purchased some gramdal from the plaintiff who carried on business at Kolhapur which, the evidence shows, is at a distance of 38 miles from Shankeshwar. The agreed price of the said goods was Rs. 863.94 out of which Dundage had already made a part payment of Rs. 180 on the 17th of August, 1965. On that date, the goods in question were loaded in a truck, but were looted at Kolhapur in the course of some disturbances there, and the balance of Rs. 683.94 remained to be paid by Dundage to the plaintiff towards the price of the said goods. On the 19th of August, 1965, Dundage purchased a draft for the said balance of Rs. 683.94 from the Shankeshwar branch of the Belgaum Bank, and it is common ground that it was dispatched by him by post to the plaintiff on that very day. The evidence of the plaintiff's sons shows that the plaintiff's shop was closed throughout the 20th of August, 1965, and the draft came to the plaintiff's hands

on the night of the 20th of August 1965. The evidence of Karnik, the agent of the Kolhapur branch of the defendant bank, shows that between 11 a.m. and 12 noon on the 20th of August, 1965, instructions were received from Dundage to stop payment of the said draft to the plaintiff, and Dundage has stated in his evidence that he issued those instructions because he had come to know on the evening of 19th August, 1965, or on the 24th of August, 1965, but that difference in date is not material for the purpose of deciding the present revision application. The defendant bank declined to make payment of the said draft to the plaintiff by reason of the instructions given by Dundage to stop payment thereof, and after a formal notice, the plaintiff, therefore, filed the present suit to recover the amount of that draft from the defendant bank.

2. The interesting and important question that arises in this case is, whether the purchaser of a draft from a bank, which has been made out in favour of a third party, has any right to stop payment of that draft, and if so, till what stage can he do so. Before referring to the authorities, I would prefer to deal with the relevant provisions of the Negotiable Instruments Act. Section 85-A of the Negotiable Instruments Act, 1881, is in the following terms :

"Where any draft, that is, an order to pay money, drawn by one office of a bank upon another office of the same bank for a sum of money payable to order on demand, purports to be endorsed by or on behalf of the payee, the bank is discharged by payment in due course."

3. What is "payment in due course" is defined in the following terms in s. 10 of the said Act :

""Payment in due course" means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount therein mentioned."

4. The only other sections in the said Act applicable to drafts are ss. 123 to 131 which are expressly made applicable by reason of the provisions of s. 131-A of the Act, but, in so far as it is common ground that the draft, in the present case, was not a crossed draft, I am not concerned with those sections. The only sections with which I am concerned are s. 85-A and s. 10 of the Act which have already been quoted above.

5. It is the contention of Mr. Joshi on behalf of the defendant-bank that his clients were justified in refusing payment of the draft because, in view of the express instructions of Dundage who was the purchaser of the demand draft from their Shankeshwar branch, the defendant bank had reasonable ground for believing that the plaintiff was not entitled to receive payment of the amount of the draft and, under these circumstances, if the defendant bank was to make payment in spite of those instructions from Dundage, it could not avail itself of the provisions of s. 85-A of the Act and be discharged from liability by reason

thereof.

6. This questing has been dealt with in three decisions of courts other than this court. The first of them, in chronological order, is the decision of a Division Bench of the Lahore High Court in the case of Malik Barkat Ali v. Imperial Bank of India [1945] 15 Comp Cas 108 (Lah). The facts of that case were that one Malik Barkat Ali was selected as Provincial Manager of the Crown Brand Tea Company at Dacca, and he was required to deposit a certain amount by way of security money by means of a bank draft. His father, accordingly, purchased a draft for Rs. 5,000 made out in favour of the Crown Brand Tea Company by the Imperial Bank of India on its Dacca branch, and instructed that bank to debit the amount of that draft to his current account, which was done on the 19th of December, 1940. Malik thereafter proceeded to take charge of his post, but as soon as he arrived at Dacca, he formed the impression that the company was a bogus concern and he accordingly sent a telegram to his father the same evening that payment of the draft should be stopped "anyhow". His father, accordingly, sent a telegram to the Dacca branch of the Imperial Bank asking them to stop payment which reached that branch on the 23rd of December, 1940. On the morning of the same day Milk's father went personally to the office of the Imperial Bank in Lahore and asked them to arrange for their Dacca branch to stop payment of the draft explaining the reasons for doing so. The bank hesitated at first, but ultimately agreed to his request, but before payment could be stopped by Lahore branch sending an intimation to the Dacca branch, the draft had already been cleared that afternoon. Malik's father who was the purchaser of the draft thereupon sued the Imperial Bank on the ground that they had acted negligently in refusing to stop payment on being asked to do so for the reasons given to them at that time. In a lucid and well-considered judgment, it was held (at page 111) that the issue of a draft is regarded in banking practice as a matter of purchase, the person at whose instance the draft is issued, being regarded as the purchaser, and that the question that fell to be decided was what were the conditions on which a bank could stop payment of a draft after it had reached the hands of the persons in whose favour it was drawn, and whether it could do so at the instance of the purchaser. The law in regard to that question was laid down in the said case in the following terms (p. 111) :

"Ordinarily, a bank cannot stop payment of a draft unless there is some doubt as to the identity of the person presenting it as being or properly representing the person in whose favour it is drawn. This appears from Sheldon's Practice and Law of Banking, 1931, p. 155. The position of a bank in regard to its own drafts is not quite the same as its position in regard to cheque drawn on it, since it has taken on commitments of its own in favour of a third person at the instance of the purchaser. This seems to be in accordance with the provisions of the Negotiable Instruments Act."

7. Section 85A and s. 10 of the Negotiable Instruments Act were then referred to, and it was observed as follows (P. 111) :

"This section (s. 10) would seem to indicate that the question with regard to which a bank has to satisfy itself is that of the title of the person presenting the draft. If a draft is lost, for example, a risk may arise that it will be presented by someone who is not entitled to be the holder and there may be a forged endorsement. In such cases, the purchaser may reasonably ask the bank to be on its guard against presentation by the wrong person; and, if the bank does not exercise the necessary precautions, the purchaser may sue the bank for negligence. It is with cases of this kind that the reported decisions are mostly concerned. On the other hand, it does not appear that the purchaser is entitled to ask the issuing bank to stop payment on other grounds, such as matters relating to the consideration in respect of which the draft has been issued at his instance, for this would often put the bank in an impossible position, as when the purchaser of the draft is dissatisfied with some bargain which he has made with the person in whose favour the draft has been issued."

8. It was, therefore, held in *Barkat Ali's case* [1945] 15 Comp Cas 108 (Lah) that, since the bank had no reasonable grounds for supposing that the person presenting the draft was not entitled to receive payment of the amount thereof, the bank was discharged under the provisions of the Negotiable Instruments Act, and the dismissal of the plaintiff's suit by the lower court was confirmed by the High Court. I am in entire agreement with the law as laid down by the Lahore High Court in *Barkat Ali's case* [1945] 15 Comp Cas 108 (Lah).

9. In *Barkat Ali's case*, the Lahore High Court was, however, concerned only with the situation of the stopping of payment by the purchaser of a draft after it had reached the hands of the payee thereof, and the question as to whether the purchaser of the draft has any right to stop payment of it prior to the stage at which the draft reaches the hands of the payee has not been considered in the said case. That question has been dealt with in two other cases to which I will now refer.

10. In the case of *Mohanlal Jogani Rice & Atta Mills v. Ramlal Onkarmal Firm*, AIR 1957 Gua 133, the question which arose before a Division Bench of the Assam High Court was whether issue of the draft in that case and the making of a debit entry to the account of the purchaser of the draft amounted to payment and the ready of the plaintiff to whom defendant No. 1 owed money in respect of a commercial transaction between them was against its debtor, viz., the bank on which the draft was drawn. In that case, a sum of Rs. 9,000 odd was due from defendant No. 1 to the plaintiff. For the payment of that amount the defendant gave a cheque drawn by Nathuram Jai Dayal of Sibasagar on the Tripura Modern Bank at Sibasagar in favour of defendant No. 1. The cheque was duly endorsed in favour of the plaintiff. The plaintiff sent it to the Calcutta Commercial Bank at Gauhati for collection. That bank sent it to the Tripura Modern Bank at Sibasagar for payment. The latter bank instead of paying the amount in question sent a demand draft for the amount of the cheque, deducting commission, but instead of issuing the draft in favour of its branch at Gauhati it addressed the draft to its

Calcutta office.

11. The demand draft was sent to the Calcutta Commercial Bank of Gauhati and that bank sent it for collection to its own head office at Calcutta. That head office closed its business and before the cheque could be presented for payment to the office of the Tripura Bank at Calcutta to which it was addressed, that office also had closed its doors. The demand draft was thereupon returned to the plaintiff as dishonoured. The plaintiff then filed a suit claiming the amount and impleading the Calcutta Commercial Bank as well as the Tripura Modern Bank as defendants, besides the original defendant No. 1 who was principally liable for the amount. Rejecting the defendants' contention and decreeing the plaintiff's suit, it was stated in the judgment in the said case (Para 7) that, except when it was intended otherwise, the issuing of a cheque was only a conditional payment and the liability was extinguished only when the cheque was cashed. A banker's draft was in that respect analogous to a cheque and was also in the nature of a conditional payment and if the creditor was unable to obtain satisfaction of the draft he could fall back upon the original consideration and recover the amount from the debtor. It was further stated in that case that the difference between a draft and a cheque consisted in two facts; firstly, that a draft can be drawn only by a bank on another bank and not by a private individual as in the case of a cheque, and, secondly, that it cannot be "so easily countermanded" as a cheque, either by the person purchasing it, or by the bank to which it is presented. It was laid down that where a bank issued a draft on its own branch and there was an express or implied agreement between the parties at the time of the issue of the draft by the bank on its own branch that the sole object of the issue of the draft was to transmit the money from one place to another for the express purpose of being paid to the person applying for the draft or some nominee of his, a fiduciary relationship was created between the bank which issued the draft and the customer who took it, "provided that bank had not actually parted with the money held by it as agent acting on the instructions of the principal, thus terminating the relationship of principal and agent". The decision in this case is useful in the present case only for the purpose of clarifying the precise nature of the legal relationship created by the issue of a draft.

12. Both these cases were considered by a single judge of the Allahabad High Court in the case of Pt. Sidh Nath Shukla Vs. Punjab National Bank of India Ltd., , in which the facts were that on the 10th of September, 1947, the plaintiff purchased a draft for Rs. 6,000 from the Nayaganj branch of the defendant bank in the city of Kanpur in the name of one Ram Narain of Lucknow, but the plaintiff retained the draft with himself and had not yet handed it over to the said Ram Narain when he informed the defendant bank that the draft should be cancelled and the money paid back to him and offered to furnish an indemnity bond for the amount of the draft. The defendant bank, however, refused to pay back the amount to the plaintiff, and the plaintiff, therefore, filed suit to recover the same with interest. It was sought to be contended on behalf of the defendant bank that the plaintiff had no authority to cancel the instructions already acted upon,

and that it was only Ram Narain in whose name the draft had been prepared who could claim the amount. Dealing with that contention, it was held by Srivastava J. (para. 13), that it was not as if a draft could never be countermanded or its payment stopped in any circumstance, but that the difficulty in countermanding or stopping payment of a draft could arise only when the draft had already passed into the hands of the payee or had been endorsed in favour of another person. It was stated that it was only after delivery that the payee of the draft could claim any rights in respect of it and become entitled as a holder to receive or recover its amount. Srivastava J. laid down that before the draft was delivered to the payee, it was, therefore, open to the purchaser to get the draft cancelled and to instruct the bank not to pay the amount to any one else, but to return it to him, as the purchaser could treat the bank which had issued the draft as his own debtor and could, as a creditor, demand the amount from the bank, and the bank would be liable to satisfy that demand. Srivastava J. further laid down that the only thing that the bank could insist on was that the draft should be handed back to it so that there might be no chance left of any other person making a claim on its basis, and that it was only after the draft had been delivered to the payee and his rights had come in, that the purchaser's right to claim the money and to stop the payment became "disputable". It was held that at that stage the bank could reasonably say that in order to have an effective discharge from liability it was necessary to have the consent of the payee before the amount could be paid to the purchaser.

13. From a consideration of these authorities, in my opinion, the following propositions emerge :

- (1) The relationship of the purchaser of a draft and the bank from which that draft has been purchased is merely that of the debtor and creditor.
- (2) The purchaser of the draft can, therefore, call upon the bank from which he has purchased it to cancel the draft and pay back the money to him at any time before the draft has been delivered to the payee.
- (3) If, however, the sole object of the draft was to transmit the money to another person, a fiduciary relationship is created between the purchaser of the draft and the bank which issued it, and the purchaser of the draft can countermand payment only if the bank has not actually parted with the money held by it as agent, thus terminating the relationship of principal and agent.
- (4) Ordinarily, a bank issuing a draft cannot refuse to pay the amount presenting it as being or properly representing the person in whose favour it was drawn, or, in other words, unless there is reasonable ground for disputing the title of the person presenting the draft, and
- (5) Once the draft has been delivered to the payee or his agent, the purchaser is not entitled to ask the issuing bank to stop payment of the draft to the payee on other grounds such as matters relating to consideration, and the issuing bank can thereafter pay back the amount of the draft to the purchaser of the draft

only with the consent of the payee.

14. Turning to the facts of the present case, in the light of this legal position, the first and the most important question which arises is, when was the draft in the present case delivered to the plaintiff who was the payee thereof, or to his agent. The learned trial judge has come to the conclusion that, having regard to the evidence of the plaintiff's son, it is clearly established that the plaintiff had not received the draft before its payment was stopped by Dundage, the purchaser of the draft. In my opinion, that finding is, however, not correct. It is common ground that the draft, in the present case, was sent by Dundage to the plaintiff by post, and, indeed, having regard to the fact that the parties were in two different towns, in the normal course of business, it would ordinarily not be sent otherwise. The subsidiary question which, therefore, arises is, whether, on that admitted position, it could be said that the post office was the agent of the plaintiff, for, if that be the position, once the draft was posted by Dundage, it must be held to have been delivered to the plaintiff's agent and, therefore, to the plaintiff himself. In the case of *Jagdish Mills Ltd. Vs. The Commissioner of Income Tax, Bombay North, Kutch and Saurashtra, Ahmedabad*, , after considering a previous decision its own, the Supreme Court came to the conclusion (P. 121) that in the normal course of affairs, it could not be imagined that cheque drawn in Delhi would be sent by a messenger to Baroda, so that they might be delivered personally at Baroda, and that the only reasonable and proper ways of dealing with such a situation was that the payment would be made by cheque, which Government would send to the appellant at Baroda by post which would be in accordance with the course of business usage in general. In short, the Supreme Court, on the facts before it, took the view that where parties were at two different towns separated by some distance, "there was imported by necessary implication an implied request to send the cheque by post thus constituting the post office its (payee's) agent for the purpose of receiving those payments". That is precisely the position in the present case. The independent and unchallenged evidence of the agent of the Kolhapur branch of the defendant-bank shows that Shankeshwar and Kolhapur branch of the defendant-bank shows that Shankeshwar and Kolhapur are separated by a distance of 38 miles.

15. The evidence shows that the purchaser of the draft was at Shankeshwar and the payee of the draft was at Kolhapur. Under those circumstances, in accordance with the course of business usage in general, the only reasonable inference that the court can draw is that there was an implied request by the plaintiff that the draft should be sent to him by post by Dundage, for it would be hard to conceive of personal delivery of the draft being contemplated in the course of a routing commercial transaction of this nature when parties are located in two different towns at some distance from each other. I, therefore, hold that the post office in the present case was the agent of the payee, and when Dundage who had purchased the draft from the defendant bank's office at Shankeshwar, posted that draft at Shankeshwar on 19th August, 1965, the act of posting itself

amounted to delivery of the draft to the plaintiff. In that view of the matter, it must be held that the draft in question had reached the payee before payment was purported to be stopped by Dundage between 11 a.m. and 12 noon on 20th August, 1965. It is common ground that there was no dispute in the present case in regard to the plaintiff's title to the said draft, the only dispute refused by Dundage being in regard to the consideration for the said draft. As held by the Lahore High Court in Barkat Ali's case [1945] 15 Comp Cas 108 (Lah), Dundage was not entitled to ask the defendant-bank to stop payment on that account, and the defendant-bank was not entitled to refuse to payment of the draft to him by the defendant bank would, in my opinion, amount to payment in due course within the terms of s. 10 of the Negotiable Instruments Act, and the defendant-bank would be discharged from liability on the basis of the principle embodied in s. 85-A of the Act. I would, therefore, make the rule absolute, set aside the dismissal of the plaintiff's suit by the trial court, and pass a decree in favour of the plaintiff for Rs. 683.94, with interest at the rate of 6% per annum from the date of the filing of the suit till payment, and with costs in both the courts.

Naik, J.

16. I agree.