

(1987) 08 KL CK 0002
In the High Court Of Kerala
Case No : A.S. No. 166 of 1985

Union of India and 3 Others

APPELLANT

Vs

Marykutty Varkey

RESPONDENT

Date of Decision : 07-08-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1987) KLJ 1039

Hon'ble Judges : P.K. Shamsuddin, J;P.C. Balakrishna Menon, J

Bench : Division Bench

Advocate : P.V. Madhavan Nambiar, for the Appellant; P.N. Ramakrishnan Nair, K. Radhakrishnan, R. Harikrishnan and V. Satheesh, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Shamsuddin, J.—Defendants 1 to 4 in O. S. No. 96 of 1983 on the file of the Additional Subordinate Judge's Court, Alleppey, are the appellants. The suit was for recovery of amounts alleged to be the deposits made by the Respondent. The material averments in the plaint are as follows:-

The plaintiff started Post Office Savings Bank Account No. 480926 at the Kainakary East Post Office, Alleppey on 1-4-1980 by an initial deposit of Rs. 5/-. A pass book in the name of the plaintiff in that Account was given to the plaintiff duly signed and sealed by the 4th defendant in the suit. She deposited Rs. 1,000/- on 3-4-1980, Rs. 45,000/- on 18-6-1980, Rs. 5000/- on 2-7-1980, Rs. 2,400/- on 11-7-1980, Rs. 2900/- on 23-7-1980 and Rs. 1000/- on 14-2-1981. These deposits were credited in her pass book duly signed and sealed. The source of these deposits was withdrawals from her account at Dhanalakshmi Bank, Kainakary, withdrawals from deposits at the Co-operative Bank, Chennamkary and Kainakary respectively, the income derived from her property at Changanacherry and the sale consideration of the property sold by her on 17-6-1980. She required to withdraw some money and approached the 4th defendant with her pass book, but she was directed to come on 30-7-1981 and

on that date to 31-7-1981 stating that the amount had to be obtained from the Head Office, Alleppey. On 31-7-1981 she went to the Post Office to withdraw the amount. Then she came to know that the 4th defendant was arrested in connection with a complaint filed by a depositor. In August 1981 she approached the 3rd defendant, the Superintendent of Post Offices, Alleppey, for withdrawing the amount, whereupon she was directed by him to hand over the original pass book to him. After obtaining photostat copies of the same from the Jose Studio, Alleppey, she handed over the original pass book to him and obtained Ext. A2 receipt dated 3-8-1981, acknowledging the receipt of the passbook. Finding that the amounts deposited by her were not given to her, she approached the Post Master General, Trivandrum, the 2nd defendant in the suit, on 19-11-1981, and made a representation requesting to pay the amount. She to a reply dated 25-9-1981 from the 3rd defendant requesting her to wait for some time more. Finding her efforts to get back the amount yielded no result, she made representations to the 2nd defendant, the Chief Minister of Kerala and the Central Minister of Tele communications with photostat copies of the pass book and the receipt. While matters stood so, the 4th defendant asked her to sign a receipt and obtain the pass book. The 4th defendant directed her to write Rs. 5/- in a paper and sign in it. Accordingly she wrote and gave the receipt. After receiving the same the 4th defendant handed over a duplicate passbook showing only an amount of Rs. 5/- as deposit in the account. She asked the 4th defendant to give back her receipt and to take back the duplicate to which the 4th defendant did not accede. Finding that the Department was not prepared to return the amount she issued a suit notice through a lawyer u/s 80 C. P. C. on 8-12-1981. The defendants did not reply to that notice. It is in these circumstances that the plaintiff filed the above suit.

2. Defendants 1 to 3 filed a joint written statement repudiating the liability. It is stated that one V. A. Joseph was appointed as the E. D. Branch Post Master, Kainakary East (Mobile) on 29-6-1976 and while working as the E. D. Branch Post Master, he embezzled a total sum of Rs. 74,304/- entrusted with him for deposit in S. B. A/c. Nos. 48017, 48017 and 480926 during the period from 28-9-1979 to 14-2-1981. It was also contended in the written statement that the plaintiff started an S. B. Account No. 480926 at Kainakary East Mobile Branch Office with a deposit of Rs. 5/-, but the subsequent alleged deposits amounting to Rs. 57,300/- did not find a place in the S B. Journal of the Kainakary East or the Account Office of the Branch Office Except a deposit of Rs. 5/- no other deposits were seen made by the plaintiff and the alleged deposits of Rs. 57,300/- had not been incorporated in the account by V. A. Joseph, the concerned Extra Departmental Branch Post Master. After preliminary investigation into the case of S. B. frauds at Kamakary East (Mobile) Branch Office, a report thereon was given to the sub Inspector of Police, Puluicunnu on 3-8-1981 by the then Superintendent of Post Offices, Alleppey. Pursuant to that, Sri. Joseph was arrested. It is also alleged that the alleged deposits were made at the residence of the plaintiff instead of at the counter of the Post Office where deposits were to

be made as per rules. The plaintiff was also a participant in the fraud and the suit was liable to be dismissed as not maintainable.

3. On behalf of the plaintiffs Exts. A1 to A21 were marked and P. Ws. 1 to 6 were examined and on behalf of defendants, Exts. B1 to B15 were marked and defendants 1 to 3 were examined.

4. After elaborate consideration of the oral and documentary evidence in the case, the lower court found that the plaintiff had made the deposits and passed a decree against defendants 1 and 2 for recovery of Rs. 57,305/- together with interest at 12% from the date of notice of demand till date of decree and thereafter at 6%. Dissatisfied with the judgment and decree of the trial court the defendants have filed this appeal.

5. In this appeal, Counsel for the appellant strenuously contended that there was an initial deposit of Rs. 5/- by the plaintiff and thereafter the plaintiff had not really deposited any amount and the entries found in Ext. A1 were not genuine and were falsely made as a result of collusion between the plaintiff and the then Extra Departmental Post Master Sri. V A. Joseph. Though in the written statement it was alleged that the plaintiff was also a participant to the fraud played by Sri. Joseph to defraud the Union of India and the Postal Department for the purpose of obtaining unlawful gain for themselves, the defendants were not able to substantiate that contention. It is not disputed that the various deposits alleged to have been made by the plaintiff have been entered in the pass book duly issued from the Post Office. In the circumstances it is for the defendants to prove that those entries were false and not genuine and cannot be acted upon. In this connection the following observations of the Supreme Court in the decision in Union of India (UOI) Vs. Chaturbhai M. Patel and Co., are relevant:

It is well-settled that fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt, per Lord Atkin in AIR 1941 93 (Privy Council) However, suspicious may be the circumstances, however strange the coincidences, and however grave the doubts, suspicion alone can never take the place of proof.

The learned Counsel for the appellant has brought to our notice the decision of the Supreme Court in State Bank of India (Successor to The Imperial Bank of India) Vs. Shyama Devi, . He particularly placed reliance on the following observations in that case:-

The onus was on the plaintiff to show that she paid the amounts to an employee of the Bank and was received by that employee in the course of his employment. The false and fraudulent entry about the deposit of this amount in the Pass Book, could not shift the onus on the Bank to prove the contrary.

In the above referred case the evidence fully established that certain entries were false and that the amount deposited in the S.B. Account were not handed

over to the concerned clerk at the S.B. counter, but entrusted with one K.D. Shukla who, though an employee of the Bank, was a close neighbour of the respondent and a friend of her husband Bhagavathi Prasad. The Supreme Court also took notice of the material and substantial variance between the averments in the plaint and the evidence furnished by the husband of the plaintiff regarding the deposits made. In that case in paragraph 3 of the plaint it was stated that payments were made to K.D. Shukla. In his evidence the husband of the plaintiff deposed that payments were not made to Shukla, though confronted with the above averments in the plaint, he had to admit that what was stated in the plaint was correct. The Supreme Court also noticed the failure of the plaintiff to go to the witness box and on the facts proved in that case, came to the conclusion that the entries relating to the deposits were false and were not by the concerned officer. The Supreme Court also found that even assuming that Sri. Shukla received the amounts for payment at the counter he was only acting as an agent of the plaintiff and it cannot be said that he received the amount in the course of his employment with the Bank. This conclusion was rested on the fact that Shri. Shukla was not the concerned clerk at the S. B. counter and the receipt of money by him does not constitute him as the agent of the Bank and/or makes his act in receiving the amount as one done in the course of employment.

6. In the instant case there is no proof that the entries made in the pass book evidencing the deposit of amounts are false. The evidence of P.W. is the plaintiff, amply proved the deposits made by her. Though she was cross-examined at length, nothing has been brought out to discredit the veracity of the testimony of this witness. P. W. 5 a neighbour of P. W. J deposed that she had witnessed the deposit of Rs. 44,000/- made by the plaintiff with the Post Master, Mobile Post Office, Kainakary East. Her evidence also appears to be truthful. P. W. 1 also stated that though the consideration shown in the document for the sale of her property was really Rs. 50,000/-, only a lesser amount was shown in the document. This evidence has been corroborated by the evidence of P. W. 4 who is an attest or to the document of sale. P.W. 2 the Manager of the Dhanalakshmi Bank proved Ext. A7 certificate relating to cumulative fixed deposit made by the plaintiff. P. W. 3 the Secretary of the Attuvathala Co-Operative Bank proved Ext. A6 certificate which disclosed the fixed deposit made by the plaintiff and payments of the said amount with interest to the plaintiff. The evidence of these witnesses show that the plaintiff had necessary source for making the deposits. As against this there is absolutely no evidence to show that the plaintiff had not actually made deposit, other than the initial deposit of Rs. 5/-. The fact in the other records maintained in the Post Office corresponding entries of deposits other than deposit of Rs. 5/- have not been made, will not show that no deposits other than Rs. 5/- were made. It will only indicate that Joseph the Branch Manager, deliberately did not make corresponding entries in the other registers with the intention of defrauding the postal department.

7. The learned counsel for the appellant also argued that the plaintiff made payments at her residence and at the mobile counter. It was also contended that

according to instructions payments could be accepted only at the counter. In this connection the evidence of DWs. 1 and 2 and also Ext. B8 were pressed into service. Ext. B8 only states that the mobile Post Office will work at the mobile point. There is no proof of any documentary evidence to indicate that in the case of mobile post office also, there is prohibition against receiving deposits at the residence of depositors. Even if there is such a prohibition, we do not think that it will change the legal position regarding liability of the Department. On the basis of the evidence furnished by D.Ws. 1 and 2 and Ext. B8, the learned Counsel for the appellant raised two-fold contentions namely, (1) since the amounts were received at residence against instructions, it cannot be considered that the post master was doing the act in the course; of his employment, and (2) the Post Master was acting only as an agent of the plaintiff in receiving the amount for deposit. In support of the second contention the learned counsel also placed reliance on the decision in *State Bank of India v Shyama Devi* (A.I.R. 1978 S.C. 1263) referred to earlier. As indicated above in that case K. D. Shukla an employee of the Sank who received the amount for deposit was not the concerned clerk at the S.B. counter of the Bank who was authorised to receive deposits. Therefore Sri. Shukla, though was an Officer of the Bank, could have acted only as an agent of the plaintiff in receiving the amount. But in the instant case, the Post Master of Kainakarl East Post Office, Alleppey, is the person who was authorised to accept deposits. It cannot be forgotten that it was a mobile post office. Though it had counter and depositors were expected to make the payments at the counter it cannot be said that in receiving the deposits at the residence and issuing the pass book after making due entries in the pass book, he was acting as an agent for the plaintiff. Payments had to be made to the Post Master himself and in the circumstances by no stretch of imagination it can be said that he acted as an agent of the plaintiff in receiving the money for making payments to himself.

8. We will now deal with the first contention raised by the learned Counsel for the appellant that the deposits were accepted in violation of the instructions given by the Department not to accept the deposit in the residence and that therefore the Post Master cannot be considered to have acted in the course of employment. We had occasion to consider a similar contention raised in the decision in *Mrs. C.V. Omana & Others v. P.V. David & Others* (1987 K.L.J. 761). It was contended in that case that the passenger was given lift by the driver in violation of the prohibition of the Master. Following the decision of the Supreme Court in *Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another*, and also a Division Bench ruling of the Karnataka High Court in *M. S. Rayta v. Gowrawwa Channabasspa* (AIR 1987 Karaat. 187) was held even on the assumption that there was prohibition by the Master against giving lift to another person, the accident took place while the defendant was plying the vehicle in the course of the employment of his Master and that therefore the master would be liable notwithstanding the alleged prohibition, if it is proved that the accident had taken place as a result of rash and negligent driving of the

servant. It cannot be disputed that in the instant case the 4th defendant was acting in the course of employment of respondents land 2 in receiving the deposits and even if there were rules prohibiting receipt of deposits at the residence that cannot absolve defendants 1 and 2 from the liability since the Post Master was acting in the course of employment.

9. A similar question arose for consideration of a Full Bench of Punjab and Haryana High Court in Pirthi Singh and another v. Binda Ram and others (A.I.R. 1987 Punj. & Har. 56). In that case the driver of the truck carried the deceased as a passenger in the truck in contravention of the provisions of the Punjab Motor Vehicles Rules. The court held that the vicarious liability of the master does not depend on the lawful or unlawful nature of the acts of the servant and the master would be liable for the alleged act of the servant which had taken place in the course of his employment even though the servant may have acted in contravention of some of the provisions of the statute or the Rules made thereunder, and that determining factor so far as the liability of the owner is concerned is whether the act was committed by the driver in the course of his employment. It was held that if the driver was acting in the course of his employment then the owner would be liable even though he acted against the express or implied instruction of the owner or in violation of the Rules framed under the Statute.

10. This question has been discussed in Winfield and Jolowicz on Tort, Twelfth Edition at page 583 under the heading "Wilful wrong of servant". It will be instructive to quote the relevant passage:

Wilful wrong of servant.

Next, as to the servant's wilful wrongdoing. Here two rules are settled.

In the first place the act done may still be in the course of employment even if it was expressly forbidden by the master. The prohibition by the master of an act or class of acts will only protect him from liability which he would otherwise incur if it actually restricts what it is the servant is employed to do: the mere prohibition of a mode of performing the employment is of no avail. It is a question of fact in each case whether the prohibition relates to the sphere of the employment or to the mode of performance, and "the matter must be looked at broadly, not dissecting the servant's task into its component activities. by asking: what was the job on which he was engaged for his employer?

In *Limpus v. London General Omnibus Co.*, (1862) 1 H. & C. 526) a driver of the defendants' omnibus had printed instructions not to race with, or obstruct, other omnibuses. In disobedience to this order he obstructed the plaintiff's omnibus and caused a collision which damaged it. The defendants were held liable because what he did was merely a wrongful, improper and unauthorised mode of doing an act which he was authorised to do, namely, to promote the defendants' passenger-carrying business in competition with their rivals. Again in *L. C. C. v. Cattermole (Garages) Ltd.* (1953) 1 WLR 997) a garage-hand was not allowed

to drive vehicles, but it was part of his duty to move them by hand. His employers were held liable for his negligence while driving a vehicle. The question of prohibitions by the master has given rise to particular difficulty where the servant has given a lift in the master's vehicle to an unauthorised passenger. At one time there was a tendency to deny liability in the master on the basis that the unauthorised passenger was a trespasser but this will no longer do and the court must rely on the prohibition against carriage of passengers limiting the scope of the servant's employment.....

Whatever the present status of the earlier decisions on unauthorised passengers, it remains clear that even if the servant is acting outside the scope of his employment with regard to the passenger he may still be within it with regard to other road users.

In the light of the broad principles enunciated in the above rulings and also the recent trends of decisions as can be seen from the above passage quoted from Winfield and Jolowicz on Tort in regard to the liability of the master, for an act done by the servant, it has to be held in the instant case that in receiving the deposits from the plaintiff by the Post Master he was acting in the course of employment and therefore the Department is liable to pay the amounts deposited by the plaintiff which had been duly entered in the original of the pass book evidenced by Ext. A1.

In the result, there is no merit in the appeal and it is accordingly dismissed, in the circumstances, without any order as to costs.