Kesharichand Jaisukhal

Vs

The Shillong Banking Corporation

Civil Appeal No. 892 of 1963

(Raghuvar Dayal, J. R. Madholkar, R. S. Bachawat, V. Ramaswami – I JJ)

16.02.1965

JUDGMENT

BACHAWAT, J. -

The respondent is a banking company now in liquidation. The appellant had a combined overdraft and deposit account with the Shillong branch of the respondent. On December 9, 1946, the appellant gave the respondent for collection two cheques for Rs. 8,200 and Rs. 600 respectively drawn on the Bharati Central Bank, Shillong. On receipt of the cheques, the respondent credited the appellant with the sum of Rs. 8,800 in the accounts. The respondent then sent the cheques to the Bharati Central Bank, Shillong for collection. Instead of paying cash, the Bharati Central Bank sent to the respondent a cheque dated December 9, 1946 for Rs. 8,800 drawn by the Bharati Central Bank on the Nath Bank, Shillong in favour of the respondent. The respondent accepted this cheque on its own responsibility without consulting the appellant. On December 10, 1946, the respondent presented the cheque to the Nath Bank for payment. The Nath Bank returned the cheque with the remark "full cover not received". The respondent orally informed the appellant of the non-payment of the cheque on the Nath Bank, and on December 11, 1946 under oral instructions from the appellant, represented the cheque to Nath Bank for payment. The Nath Bank again returned the cheque with the remark "full cover not received", and the respondent thereupon debited the appellant with the sum of Rs. 8,800 in the accounts. On the same day, the respondent wrote to the Bharati Central Bank demanding cash payment of the two cheques drawn on them and dated December 9, 1946. The respondent also contacted the appellant. Under instructions from the appellant, the respondent accepted from the Bharati Central Bank a demand draft for Rs. 8,800 dated December 13, 1946 drawn by its Shillong Branch on its Calcutta Head Office towards payment of the two cheques. The respondent presented the draft to the Bharati Central Bank, Calcutta for payment, but instead of making payment, the Bharati Central Bank wrote on December 16, 1946 requesting the respondent to obtain payment from its Shillong Branch. The respondent orally communicated this advice to the appellant. On several dates thereafter, the respondent presented the draft to the Bharati Central Bank for payment, but the draft was not paid. On January 2, 1947, the Bharati Central Bank closed its business.

On January 11, 1947, the respondent wrote to the appellant stating that it was holding the demand draft as also the cheque on the Nath Bank and would be glad to receive further instructions in the matter for necessary action. As the appellant refused to give any instructions, the respondent continued to hold the securities on account of the appellant. In respect of the draft, the respondent duly preferred a claim in the liquidation of the Bharati Central Bank, and was admitted as a preferential creditor for the amount of the draft. On January 28, 1947, the appellant wrote to the respondent alleging that the respondent had accepted the demand draft at its own risk and

responsibility and was bound to give credit to the appellant for the sum of Rs. 8,800. The dealings between the appellant and the respondent continued, and the last entry in the combined overdraft and deposit account is dated December 29, 1950.

On February 26, 1953, a petition was presented in the Assam High Court for the winding up of the respondent. By order dated May 24, 1953, the respondent was ordered to be wound up. On June 28, 1954 the liquidator of the respondent Bank presented an application to the Assam High Court under s. 45(D) of the Banking Companies Act, 1949 for settlement of the list of debtors, claiming a decree for Rs. 5,965-8-9 and interest against the appellant. The appellant resisted the claim. The two issues, which are now material, are :-

> (1) Is the suit barred by limitation, and
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> (4) Whether the respondent is bound to give credit to the appellant for the sum of Rs. 8,800 ?

A learned single Judge of the Assam High Court answered both the issues in the negative, and decreed the claim. An appeal preferred to a Division Bench of the High Court was dismissed. The appellant now appeals to this Court by special leave.

The main contention of the appellant in the Courts below was that the respondent had accepted the demand draft on its own responsibility. The High Court held that the respondent accepted the draft with the consent and sanction of the appellant. This finding is no longer challenged. But the appellant before us contends that the respondent having credited the appellant's account with the amount of the two cheques on the Bharati Central Bank and having accepted on its own responsibility from the Bharati Central Bank the cheque dated December 9, 1945 on the Nath Bank, ought not to be allowed to say that it received the cheque on account of and as agent of the appellant, and that in any event the respondent acted negligently and in breach of its duty as the collecting agent of the appellant and is bound to give credit for the sum of Rs. 8,800. These contentions in the present form were not raised in the Courts below. Nevertheless, we allowed the appellant to raise these contentions, but we think that there is no substance in them.

According to the uncontradicted testimony of the witness called on behalf of the respondent, the two cheques on the Bharati Central Bank were entrusted by the appellant to the respondent for collection. In paragraph 2 of its objections, the appellant admitted that the cheques were entrusted to the respondent for realisation. Beyond doubt, on December 9, 1946 the respondent received the two cheques for collection in the usual way as agent of the appellant and not with the intention of acquiring title to them. On the same day, the respondent credited the appellant's account with the amount of the cheques before the cheques were cleared. But on December 11, 1946, before the appellant drew upon this amount and as soon as the cheque on Nath Bank received in course of collection of the two cheques was dishonoured, the respondent debited the appellant's account with the like amount. It does not appear that the credit entry in the accounts was contemporaneously communicated to the appellant. Nor does the appellant prove any arrangement that the appellant was entitled to draw against the amount of the cheques before they were cleared. In the circumstances, the fact that the appellant's account was credited with the amount of the two cheques does not show that the respondent ceased to be an agent for collection of the cheques.

The respondent duly presented the cheques on the Bharati Central Bank for payment. Instead of paying the cheques in cash, the Bharati Central Bank sent its own cheque on the Nath Bank.

According to the uncontradicted testimony of the witness called on behalf of the respondent, it was not the usual practice of the banks at Shillong to collect cash in all cases in respect of cheques entrusted for collection. When the respondent found that the drawee Bank instead of paying cash offered to pay by a cheque, the respondent acting in good faith in the interests of the appellant, accepted the cheque on its own responsibility. On being informed of the dishonour of the cheque on Nath Bank, the appellant adopted and ratified the respondent's acceptance of the cheque, and on that footing, asked the respondent to represent the cheque. Subsequently, the appellant instructed the respondent to accept a demand draft drawn by the Bharati Central Bank on the head office in lieu of its cheque on the Nath Bank, and approved of all steps taken by the respondent in the matter of collection of the draft. Instead of disowning the acts of the respondent in respect of the collection of the cheques on the Bharati Central Bank, the appellant ratified them. In the circumstances, it is not open to the appellant now to say that the respondent accepted the cheque on the Nath Bank or the draft of the Bharati Central Bank on the respondent's own account and not as agent of the appellant.

A banker entrusted by its customer with the collection of a cheque is bound to act according to the directions given by the customer, and in the absence of such directions, according to the usages prevailing at the place where the banker conducts his business and applicable to the matter in hand. The banker is also bound to use reasonable skill and diligence in presenting and securing payment of the cheque and placing the proceeds to his customer's accounts and in taking such other steps as may be proper, to secure the customer's interests. In the instant case, it is not shown that the respondent acted negligently or in breach of its duties or contrary to any instructions given by the appellant or any lawful usages prevailing amongst bankers at Shillong.

There is no substance in the further contention of the appellant that by preferring a claim as creditor in respect of the draft in the liquidation of the Bharati Central Bank, the respondent accepted the draft in satisfaction of its dues from the appellant. The respondent owed a duty to the appellant to take steps in the liquidation proceedings for the realisation of the amount of the draft. By preferring the claim, the respondent preserved all rights in respect of the draft and acted in the best interests of the appellant. In the circumstances, the Courts below rightly gave appropriate directions on the respondent for giving credit to the appellant for all sums which may be realised by the respondent from the Official Liquidator of the Bharati Central Bank. The Courts below rightly answered issue No. 4 in the negative.

The next point in issue is whether the proceedings are governed by Art. 85 of the Indian Limitation Act, 1908, and if so, whether the suit is bared by limitation. The argument before us proceeded on the footing that an application under s. 45(D) of the Banking Companies Act is governed by the Indian Limitation Act, and we must decide this case on that footing. But we express no opinion one way or the other on the question of the applicability of the Indian Limitation Act to an application under s. 45(D). Now, Art. 85 of the Indian Limitation Act, 1908 provides that the period of limitation for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties is three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account. It is not disputed that the account between the parties was at all times an open and current one. The dispute is whether it was mutual during the relevant period.

Now in the leading case of Hirada Basappa v. Gadigi Muddappa [[1871] VI Madras High Court Reports. 142, 144]. Holloway, Acting C.J. observed :

> "To be mutual there must be transactions on each side creating independent

obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations."

These observations were followed and applied in Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah [[1931] I.L.R. 58 Cal. 642] and Monotosh K. Chatterjee v. Central Calcutta Bank Ltd. [[1953] 91 C.L.J. 16], and the first mentioned Calcutta case was approved by this Court in Hindustan Forest Company v. Lal Chand [[1960] 1 S.C.R. 563]. Holloway, Acting C.J. laid down the test of mutuality on a construction of s. 8 of Act XIV of 1859, though that section did not contain the words "where there have been reciprocal demands, between the parties". The addition of those words in the corresponding Art. 87 of Act IX of 1871, Art. 85 of Act XV of 1877 and Art. 85 of the Act of 1908 adopts and emphasises the test of mutuality laid down in the Madras case.

In the instant case, there were mutual dealings between the parties. The respondent Bank gave loans on overdrafts, and the appellant made deposits. The loans by the respondent created obligations on the appellant to repay them. The respondent was under independent obligations to repay the amount of the cash deposits and to account for the cheques, hundis and drafts deposited for collection. There were thus transactions on each side creating independent obligations on the other, and both sets of transactions were entered in the same account. The deposits made by the appellant were not merely complete or partial discharges of its obligations to the respondent. There were shifting balances; on many occasions the balance was in favour of the appellant and on many other occasions, the balance was in favour of the respondent. There were reciprocal demands between the parties, and the account was mutual. This mutual account was fairly active up to June 25, 1947. It is not shown that the account ceased to be mutual thereafter. The parties contemplated the possibility of mutual dealings in future. The mutual account continued until December 29, 1950 when the last entry in the account was made. It is conceded on behalf of the appellant that if the account was mutual and continued to be so until December 29, 1950, the suit is not barred by limitation, having regard to s. 45(O) of the Banking Companies Act. The Courts below, therefore, rightly answered issue No. 1 in the negative.

The claim by the respondent on account of interest was contested in the Courts below, but that claim is no longer contested before us.

The High Court discussed at length the legal characteristics of a demand draft as also questions relating to the interpretation of s. 45(O) of the Banking Companies Act. In view of the contentions raised before us, those questions do not arise, and we do not propose to express any opinion thereon.

In the result, the appeal is dismissed with costs.

MUDHOLKAR, J.

I regret my inability to agree with the judgment of may learned brother Bachawat. This appeal arises out of a petition made under s. 45-D of the Banking Companies Act, 1949 (10 of 1949) by the Liquidator of the respondent, the Shillong Banking Corporation for inclusion of the name of the appellant in the list of debtors of the Bank. The liquidator filed a list of 20 debtors of the Company with necessary particulars in Annexure A, to the application. One of the debtors mentioned therein is the appellant and the amount of debt due from him to the Bank is stated therein to be Rs. 5,965-5-9. Annexure A appears to have been prepared in accordance with the rules framed under the Banking Companies Act. The fourth item in the Annexure is "Description of papers, writings and

documents, if any, relating to each debt". In respect of this item the following particulars have been set out :

> "A cheque for Rs. 8,800 on Bharati Central Bank Ltd., Shillong was realised by the Bank 'on behalf of the party' by a Demand Draft on Calcutta Branch of the Bharati Central Bank Limited, but the said Demand-Draft could not be realised due to the suspension of business by Bharati Central Bank Ltd. The Bank's claim to be treated as preferential Creditor has been admitted."

A notice of this claim having been served on the appellant he preferred an objection before the Court. There, the appellant had contended that the claim of the Bank is barred by time. Paras 2, 3, and 5 of the objection are material and it would be convenient to set them out in full. They run as follows :

> "2. That it is a fact that this opposite-party did give a cheque for Rs. 8,800 to the Bank on the Bharati Central Bank Ltd., Shillong for realisation in 1947 and in normal course it realised the amount in cash but either for its own convenience or for remitting its own money to Calcutta it accepted a draft from the Bharati Central Bank Limited on its branch at Calcutta without any instruction or intimation to this opposite party and also this opposite-party withdrew their amount by a cheque after this and if in the meantime the said bank stopped its business this opposite-party cannot be held liable for the same.
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> (3) That had the bank not received any cash payment in case of the opposite-party's cheque as it should have received it should have informed them in time.
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> (5) That it is not a fact that the demand-draft was accepted by the bank instead of cash payment with any knowledge of this opposite-party and as such the claim of the Bank is false and frivolous."

Deka J., who heard the application framed four issues one of which related to limitation and the fourth was as follows :

> "Issue No. 4, whether the plaintiff bank is bound to give credit to the defendant for a sum of Rs. 8,800 covered by a cheque or cheques on the Bharati Central Bank Limited, Shillong Branch ?"

The only oral evidence tendered was that of Narendra Nath Dutta, Assistant of the respondent Bank. Upon a consideration of the evidence of Dutta and the documents placed on record Deka J. found against the appellant on these issues and passed a decree in favour of the Bank for Rs. 5,965-5-9 in addition to Rs. 2,000 by way of interest. He further allowed Rs. 300 as costs and 6 per cent p.a. interest on the decretal amount till realisation. An appeal was preferred by the appellant under the Letters Patent and that having been dismissed he has come up before this court by special leave. It is the case of the respondent Bank that the appellant had a mutual open and current account with the Bank. It is upon that basis that they have met the appellant's contention that the suit was barred by time. On December 9, 1946 the respondent credited two cheques to the appellant's account one for Rs. 8,200 and another for Rs. 600 and sent them for collection to the Bharati Central Bank Ltd., Shillong Branch upon which they were drawn. Instead of obtaining cash from the Bharati Central

Bank the respondent obtained and accepted from that Bank a cheque on the Nath Bank Limited. This the respondent did, as admitted by Dutta, without consulting the appellant. Dutta has further admitted that the respondent Bank obtained the cheque on their own responsibility. They then presented the cheque to the Nath Bank on December 10, 1946. The Nath Bank returned the cheque with a note "full cover not received". According to the witness the Bank referred the matter to the appellant and with his specific instruction the cheque was presented the next day to the Nath Bank, when also it was returned. Thereafter, the witness proceeds, the respondent contected the appellant for instructions. On December 13, 1946 they accepted a demand draft from the Bharati Central Bank for an identical amount which they sent to their Calcutta Branch for collection. When the demand draft was presented to the Calcutta Branch of the Bharati Central Bank they requested by letter dated December 16, 1946 to present it to the Shillong Branch. Then, according to Dutta, on the advice of the appellant they presented the draft to the Shillong Branch of the Bharati Central Bank. In the meanwhile the Bharati Central Bank had applied for moratorium and this demand draft was not cashed. It would appear that in the proceedings for reconstructing the Bharati Central Bank the respondent asked to be treated as preferential creditors in respect of the amount for which the draft had been made out and have been so treated.

It is contended on behalf of the appellant that the respondent having accepted the demand draft on their own responsibility and having sought to be treated as preferential creditors of the Bharati Central Bank and having in fact been so treated cannot now turn round and say that the appellant's cheques were not honoured and that, therefore, they are entitled to claim the sum of Rs. 5,965-5-9 and interest from him. The question to which I would address myself is whether the respondent has to be regarded as the appellant's agent only for the collection of these two cheques or whether they received these two cheques for being credited in the mutual and open current account between themselves and the appellant. It is no doubt that where a customer hands in a cheque to his banker for collection the banker accepting the performance of that duty becomes the agent of the customer for the purpose of collection. But if a banker credits a cheque in the customer's account with the bank would the banker be necessarily deemed to be his agent when he takes the step of collecting the amount payable under the cheque. If the customer makes an endorsement on the cheque to the effect that it is handed in for collection no difficulty would arise. But if there were no such endorsement what would be the position ? The accepted position in banking law is that when a banker receives money from a customer he does not hold it in a fiduciary capacity. (see Practice and Law of Banking by H. P. Sheldon, 8th edn. p. 201). As the author points out : "To pay that money is 'deposited' with a banker is likely to cause misapprehension. What really happens is that the money is not deposited with, but lent to the banker, and all that the banker engages to do is to discharge the debt by paying over an equal amount when called upon." Sheldon has quoted the following observations of Lord Cottenham in Foley v. Hill (1948).

> "Money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who, is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. They money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit he can, which profit he retains to himself, by paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places..... That being established to be the relative situations of banker and customer, the banker is not an agent or factor, but he is a debtor."

What would be the position if instead of paying in cash the customer hands in cheques or bills ? With regard to this Sheldon has said as follows :

> "In Joachimson v. Swiss Bank Corporation, 1921 Lord Justice Atkin gave an admirable summary of the position. He stated that the banker undertakes to receive money and collect bills for his customer's account, and that money so received is not held in trust for the customer but borrowed from him with a promise to repay it or any part of it ..... against the customer's written order addressed to the bank at such branch." (pp. 201-202).

In the appeal before us the two cheques for Rs. 600 and Rs. 8,200 have not been placed on record and so we do not know in whose favour they were drawn and if they were drawn by the appellant in favour of "self" what endorsement he had made on the back of the cheques. The cheques could have been drawn by the appellant either in his own favour or in favour of the bank. Whichever be the position the fact remains that these two cheques were credited by him in his account with the respondent. That is not all. Since the appellant had a mutual open and current account with the respondent it may well be that money was owing by him to the respondent on that date and, therefore, he drew these two cheques on the Bharati Central Bank and credited them in his account with the respondent. Or it may be that the appellant merely credited the money in his own account even though nothing may have been owing from him to the respondent on that date. Whether it was one or the other the respondents would, with respect to the amounts for which the cheques were drawn, have become actual recepients of the money from the appellant, upon realisation of the cheques drawn by the appellant. Indeed, as the cheques were returned unpaid by the drawee bank the respondent have made a debit entry on December 11, 1960 of Rs. 8,800 against the appellant in his account with them. This would show that the respondent accepted the position that they were acting in this matter not as the appellant's agents but as payees. This explains why, as admitted by Dutta, the respondent accepted from the Bharati Central Bank cheques on Nath Bank on their own responsibility instead of insisting upon cash. Indeed, as pointed out at p. 300 in Chalmers on Bills of Exchange (8th ed) "consequently an authority to an agent to receive a payment due to his principal is not in itself an authority to receive it by bill or cheque". Therefore, the respondents would not have acted in the way they did had they regarded themselves as merely agents of the appellant for collecting his cheques. Dutta has, in his evidence, stated that no formal note in writing was sent to the appellant by the respondents about the dishonouring of the cheque by the Nath Bank. Nor did they inform him of having debited his account with Rs. 8,800. No doubt, according to him, after a demand draft was issued to them by the Bharati Central Bank the respondents informed the appellant. But after that draft was dishonoured on presentation, no information whatsoever was given to the appellant. This would further strengthen the conclusion that the respondents were acting for themselves at every stage after the cheques for Rs. 600 and Rs. 8,200 were credited in his account with them by the appellant. Therefore, though it is true that the sum of Rs. 8,800 was not received by the respondent in cash they must be deemed to have received the sum either by reason of the fact that they obtained from the Bharati Central Bank a cheque for Rs. 8,800 on the Nath Bank or by the acceptance by them of a demand draft drawn by the Bharati Central Bank, Shillong, on their Calcutta Branch. It is difficult to see how they can hold the appellant, whose account with the Bharati Central Bank has been debited by that Bank to the extent of Rs. 8,800, as being still liable upon those cheques. Whatever rights the respondents have, are against the Bharati Central Bank and not the appellant. Indeed, having claimed, as against the Bharati Central Bank to be treated as preferential creditors of that Bank to the tune of Rs. 8,800, particularly on their own showing what was owing to them from the appellant was something less than Rs. 6,000 they cannot now be heard to say that they merely acted as the appellant's agents.

For these reasons, disagreeing with the High Court, I hold that the appellant's name cannot be included in the list of the respondent's debtors. I would, therefore, allow the appeal and dismiss the application of the Liquidator under s. 45-D of the Banking Companies Act in so far as it relates to the appellant, with costs throughout and would direct further that the respondents pay the appellants costs both here and in the High Court.

ORDER BY COURT

In accordance with the opinion of the majority, this appeal is dismissed with costs.

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