Bihta Co-Operative Development Cane Marketing Union Ltd., and Another

Vs

The Bank of Bihar & Ors.

Civil Appeal No. 699 of 1964

(J. M. Shelat, G. K. Mitter, K. N. Wanchoo JJ)

12.10.1966

JUDGMENT

MITTER, J.

This is an appeal from a judgment and decree of the Patna High Court on a certificate granted by it.

The main question in this appeal is, whether the suit out of which this appeal arises was entertainable by a civil court, in view of the provisions of s. 48(1) read with s. 57 of the Bihar and Orissa Co-operative Societies Act, 1935. Broadly speaking, s. 48(1) enumerates disputes between certain classes of persons and/or the societies registered under the Act which have to be referred to the Registrar of Co-operative Societies for adjudication and s. 57(1) provides that no civil court shall have jurisdiction in respect of any dispute required by s. 48(1) to be so referred. This point was not taken in the written statement of any of the defendants. The subordinate Judge decreed the suit against several of the defendants including the Bank of Bihar Ltd. On appeal, the learned Judges of the Patna High Court concurred, in the main, with the findings of the Subordinate Judge but gave effect to the contention raised on behalf of two of the defendant-appellants on the basis of s. 48(9) read with s. 57 of the Act. The appellants before this Court are the plaintiffs. The only contesting respondents are the Bank of Bihar Ltd., Madan Mohan Pandit and Babu Lal Varma (defendants 1, 2 and 6 in the suit).

In order to find out whether s. 48(1) embraces the dispute between the parties in this case, we have to examine the facts out of which this appeal arises. The first appellant, Bihta Co-operative Development Cane Marketing Union Ltd. (hereinafter referred to as the Union) is a society registered under the Bihar and Orissa Co-operative Societies Act, 1935 (hereinafter referred to as the Act). The second plaintiff was a Secretary of the Union at the time when the suit was filed in 1951. Under a Resolution dated the 16th April, 1947 of the Executive Committee of the Union, the defendant No. 6, Babu Lal Varma, Joint Secretary of the Union and Ram Janame Varma, defendant No. 7, the Treasurer of the Union, were jointly authorised to withdraw moneys of the Union from the 1st defendant, the Bank of Bihar Ltd., with which it had a running account. On the 26th of May, 1948, defendant No. 6 and defendant No. 7 went to the bank to encash a cheque on behalf of the Union and then they came to learn that the funds in the account of the Union were not sufficient to meet the cheque. It appears that on the 16th of April, 1948 a sum of Rs. 11,000/- had been withdrawn from the said account by means of a cheque which did not come out of the cheque book of the Union and that a loose cheque form surrendered by an ex-constituent of the bank issued to someone on the 23rd March, 1948 had been converted into a cheque purporting to bear the signatures of defendant No. 6 and defendant No. 7. It is not necessary to state the facts in detail and it will be sufficient to note that the spurious cheque bore the signature of defendant No. 7 but the

purported signature of the defendant No. 6 thereon was found to be a forgery at the trial of the suit. Criminal proceedings were started and five defendants including defendants Nos. 6 and 7 were put on trial. Defendants Nos. 3, 4 and 5 were employees of the defendant-bank. Ultimately, however, all the accused were acquitted. The suit was instituted by the two plaintiffs against seven defendants, all of whom have already been mentioned except the second defendant who was the Manager of the Bank and in charge of its affairs and management at the relevant time. The cause of action for the suit as against defendants 3 to 7 was that they, in collusion and conspiracy with one another had authorised an illegal withdrawal of Rs. 11,000/- out of the funds of the Union lying with the bank. The bank was sought to be made liable on the ground that it was a trustee for the Union and had abused the trust by allowing the amount in question to be embezzled through its gross negligence. All the defendants put in written statements, some doing so jointly while others did so individually. A large number of witnesses were examined and the Subordinate Judge came to the conclusion that the cheque in question was a forged and fabricated document and that defendants 4, 5 and 7 acting in collusion and conspiracy with one another had withdrawn the sum of Rs. 11,000/- from the plaintiff's account with the bank fraudulently by means of the said forged cheque. He, however, thought that there was no sufficient evidence against defendants 3 and 6 and passed a decree as against defendants 1, 2, 4, 5 and 7 jointly. Defendants 1 and 2 only went up in appeal to the Patna High Court. The High Court agreed with the finding of the Subordinate Judge that defendants 4, 5 and 7 were parties to the conspiracy resulting in the withdrawal of the sum of Rs. 11,000/-, but absolved the defendant No. 2 from any liability on the ground of negligence.

Before the High Court, a further contention was put forward on behalf of the bank that even if the bank was otherwise liable for the negligence of its employees, it should not be held to be liable because defendants 6 and 7 who were the agents of the Union were negligent and dishonest in the discharge of the duty entrusted to them by the Union. The High Court, on an examination of the evidence, found itself unable to hold that there was any negligence or lack of reasonable precaution on the part of the Union. It further held that Ram Janame Varma may have been a party to the conspiracy which culminated in the withdrawal of the money through the disputed cheque, but the Union could not be said to be negligent or lacking in reasonable precaution merely because of that.

Having found in favour of the plaintiffs on the merits of the case, the High Court allowed the appeal of the bank on the ground that the jurisdiction of the civil court was ousted by the combined operation of s. 48(9) read with s. 57 of the Act. There is no controversy before us that if the dispute in the suit is covered by s. 48(1) it could not be agitated in a civil court but had to be referred to the Registrar of Co-operative Societies. It is, therefore, necessary to set out the relevant portion of s. 48(1) which reads as follows :

> "48. (1) If any dispute touching the business of a registered society (other than a dispute regarding disciplinary action taken by the society or its managing committee against a paid servant of the society) arises -
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> (a) amongst members, past members, persons claiming through members, past members or deceased member and sureties of members, past members or deceased members, whether such sureties are members or non-members; or
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> (b) between a member, past member, persons claiming through a member, past member or deceased member, or sureties of members, past members or deceased members, whether such sureties are members or non-members, and the society, its managing committees or any officer, agent or servant of the society; or

(c) between the society or its managing committee and any past or present officer, agent or servant of the society; or

(d) between the society and any other registered society; or

(e) between a financing bank authorised under the provisions of sub-section (1) of section 16 and a person who is not a member of a registered society; such disputes shall be referred to the Registrar :

Provided that no claim against a past member or the estate of a deceased member shall be treated as a dispute if the liability of the past member or of the estate of the deceased member has been extinguished by virtue of section 32 or section 63.

Explanation - (1) A claim by a registered society for any debt or demand due to it from a member, non-member, past member or the nominee, heir or legal representative of a deceased member or non-member or from sureties of members, past members or deceased members, whether such sureties are members or non-members, shall be a dispute touching the business of the society within the meaning of this sub-section even in case such debt or demand is admitted and the only point at issue is the ability to pay or the manner of enforcement of payment.

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It will be noticed that not all disputes in which a registered society may be involved are within the mischief of the section. Assuming that the dispute in this case touches the business of the Union which is a registered society, the question is : is it one which comes under any of the heads mentioned in sub-cls. (a) to (e) of the sub-section ? Sub-cl. (a) has no operation if one of the disputants is the society itself. So far as sub-cl. (b) is concerned, a dispute between the society and a non-member would only fall within this clause if the non-member was a surety of a member. Cl. (c) can have no operation unless one party to the dispute was a past or present officer, agent or servant of the society. Clause (d) is restricted to disputes between two societies. Clause (e) which was introduced by way of an amendment in 1948 (Bihar Act XVI of 1948) would certainly include a dispute in which one of the disputants is not a member of the society, but it is only operative when the other party to the dispute is a financing bank authorised under the provisions of sub-s. (1) of s. 16. The definition of "financing bank" was included for the first time in the Act by s. 2 of the Bihar Co-operative Societies Act XVI of 1948. Under the definition, a 'financial bank' means a registered society whose main object is to make advances in cash or kind to other registered societies or to agriculturists etc. It is nobody's case that the dispute in this case is one between a financing bank and a non-member. The question then arises whether the first Explanation to the section widens the scope of sub-s. (1) of s. 48 so as to include claims by registered societies against non-members even if the same are not covered by clause (e). It is to be noted that the word "non-member" was not to be found in the Explanation to the section before its Amendment of 1948. The history of legislation with regard to co-operative societies in general and Bihar and Orissa Co-operative Societies Act in particular was traced in a decision of this Court i.e., Sagauli Sugar Works (Private) Ltd. v. Assistant Registrar, Co-operative Societies, Motihari & Others ([1962] Supp. 3 S.C.R. 804-A.I.R. 1962 S.C. 1367.). In that case, there was a dispute between the appellant, a company registered under the Indian Companies Act and a society registered under the Act. The Society claimed a sum of Rs. 1,20,809/- from the appellant company as commission and interest for the supply of sugarcane and referred the same to the first respondent. The preliminary objection of the appellant to the

jurisdiction of the first respondent to adjudicate upon the dispute was over-ruled. The appellant went to the Patna High Court under Articles 226 and 227 of the Constitution for quashing the orders of the first respondent. The High Court following a previous decision in Union of India v. Registrar, Co-operative Societies Patna (I.L.R. 40 Patna, 7.) summarily dismissed the application. Before this Court, in appeal, it was contended that the dispute was beyond the pale of s. 48 and as such, not referable thereunder. The Court took into consideration the various amendments which were introduced by the Act of 1948 and observed :

> "Before the amendments introduced by the Act of 1948, the disputes which could be entertained by the Registrar were disputes among members, past members or their heirs, or their sureties or between a society and its officers, agents or servants, or between a society and other registered societies (without meaning to exhaust all the categories). But before the amendments, one who was not a member of society or was not claiming through a member or a past member or a deceased member, or was not a surety of a member or a deceased member, was not subject to the jurisdiction of the Registrar under s. 48. That is to say, any dispute between a society or its members, past members or decreased members or sureties of such members on the one hand and non-members on the other was not within the purview of the section, so that the appellant company, which is not a registered society or a member of a registered society, could not have its claim, or a claim against it by a registered society, referred to the Registrar for decision, under this section."
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> According to the Court, the effect of the amendments introduced by the Act of 1948 was "that a claim by a financing bank against a non-member to whom the former had made an advance in cash or kind, with the sanction of the Registrar under s. 16(1), would be entertainable by the Registrar, on a reference, but that does not mean that a claim which is not of the description referred to in s. 16(1) read with s. 2(c), by a registered society against any non-member, who is not an agriculturist, is within the purview of s. 48(1) read with the Explanation. The Explanation cannot be read as adding a new head to the categories (a) to (e) under s. 48(1) of disputes which may be referred to the Registrar. Originally, the Explanation had been added only to make it clear that even if a debt or demand is due and the only point at issue is the ability to pay or the manner of enforcement of payment the dispute would come within the purview of the main section 48(1). The addition of the word 'non-member' by the Amending Act of 1948, to the First Explanation has not enlarged the scope of the main section 48(1) so as to make all kinds of disputes between a registered society and a non-member cognizable by the Registrar, thus excluding the jurisdiction of the ordinary courts."

Appearing for the respondents 1 and 2, the learned Solicitor General in effect contended that the above decision required re-consideration and the words in the Explanation must be understood in their widest amplitude so that even if a dispute between a registered society and a non-member which did not fall within any of the categories (a) to (e) it would still be within the purview of the section by reason of the Explanation.

We find ourselves unable to accept this contention. Before the amendments introduced in 1948, the Explanation to the section made no mention of non-members and non-members had to be included in the Explanation because of the inclusion of this class of persons in category (e) of sub-s. (1) of s. 48. The Explanation must be read so as to harmonise with and clear up any ambiguity in the main

section. It should not be so construed as to widen the ambit of the section. The scheme of sub-section (1) of s. 48 seems to be that certain disputes touching the business of a registered society should not be taken to civil courts and made the subject matter of prolonged litigation. The legislature took pains to specify the persons whose disputes, were to be subject matter of reference to the Registrar. Non-members did not come into the picture at all. Non-members other than officers, agents or servants of the society do not figure in sub-cls. (a) to (d) except as sureties of members. By sub-cls. (e) only those non-members who had disputes with a financing bank authorised under the provisions of sub-s. (1) of s. 16 were made amenable to the jurisdiction of the Registrar. It was probably thought desirable in the interest of the financing bank which might otherwise be faced with litigation in a civil court in respect of its ordinary day-to-day transactions of advances to agriculturists who were non-members that disputes between the society and this class of persons should be quickly and inexpensively adjudicated upon by the Registrar. Before the amendment of 1948, the Explanation only served to clear up the doubt as to whether a dispute was referable to the Registrar when the debt or demand was admitted and the only point at issue was the ability to pay or the manner of enforcement of payment. As already pointed out by this Court, the Explanation had to include non-members after the insertion of category (e) in sub-s. (1) of s. 48. The purpose of the Explanation never was to enlarge the scope of sub-s. (1) of s. 48 and the addition of category (e) to that sub-section and the inclusion of non-members in the Explanation cannot have that effect.

In our opinion, the High Court was not justified in allowing the appeal of the bank on that ground.

The learned Solicitor General then sought to support the judgment of the High Court on the ground that its decision on the merits of the case was not correct. His argument in substance was that even though there was negligence on the part of the bank and its employees, the plaintiff society was not altogether free from blame or negligence in that but for the part played by at least one of its employees in the matter of encashment of the cheque for Rs. 11,000/- the fraud could not have been perpetrated. It was argued that if both parties were negligent or blameworthy, the plaintiffs' claim ought not to succeed. He referred us to the judgment of the House of Lords in London Joint Stock Bank, Limited v. Macmillan & Arthur ([1918] A.C. 777.) in support of his argument. The facts in that case were as follows :

> The plaintiffs, Messrs. Macmillan and Arthur brought a suit for a declaration that the defendant, the London Joint Stock Bank, was not entitled to debit the plaintiffs with a cheque for pound 120. The plaintiffs had in their employ a confidential clerk who had been with them for some years. They left to him the copying of their books and filling up cheques for signatures. The usual practice in the office of the plaintiffs seems to have been for the clerk to present cheques for signatures to get petty cash usually for pound 3. On a certain day, the clerk made out a cheque for pound 2 and asked one of the partners to sign it which the partner did. As the clerk did not turn up the next day, the partners became suspicious and went to the bank. There they learnt that the clerk had presented a cheque for pound 120 which had been paid. The clerk was a thief and had absconded with the money. The learned trial Judge found that at the time when the cheque was presented to the partner for signature the figure '2' was written thereon with enough space on either side for insertion of additional figures and the clerk had taken advantage thereof and altered the figure '2' to 120. The question was, whether the plaintiffs had been so negligent with regard to the cheque that their action against the bank should fail. The trial Judge found that the respondents were not guilty of any negligence in the mode of signing the cheque and

assuming that they had been guilty of negligence, the negligence was not the proximate cause of the loss. He therefore ordered judgment to be entered for the plaintiffs. The Court of Appeal upheld this decision. This was, however, reversed in appeal by the House of Lords. Lord Finlay L.C. observed :

> "As the customer and the banker are under a contractual relation in this matter, it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery. Crime, is indeed, a very serious matter, but every one knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description."

The learned Lord Chancellor observed further at page 795 :

> "Of course the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character. Attempts have often been made to extend the principle of Young v. Grote, 4 Bing. 253 beyond the case of negligence in the immediate transaction, but they have always failed."

According to the learned Lord Chancellor, leaving blank spaces on either side of the figure '2' in the cheque amounted to a clear breach of duty which the customer owed to the banker. The learned Lord Chancellor said :

> "If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results. No one can be certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. If owing to the neglect of such precautions it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker."

According to Lord Shaw the responsibility of what happens between the signature and presentation of the cheque, a period wholly in the customer's control, lies entirely with him.

The principle of this case cannot help the respondent before us. If the signatures on the cheque had been genuine so that there was a mandate by the customer to the banker but the cheque was somehow got hold of by an unauthorised person and encashed by him, the bank might have had a good defence. 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 any 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 defence to the bank. According to Halsbury's Laws of England (3rd Edition) Vol. 2 article 380 :

> "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."

In this case, the finding is that one of the signatures was forged so that there never was any mandate by the customer at all to the banker and the question of negligence of the customer in between the signature and the presentation of the cheque never arose. Not only was there negligence on the part of the banker in not ascertaining whether the signatures on the cheque were genuine, the circumstances attending the encashment of the cheque show conclusively that the banker was negligent and some of its officers fraudulent right from the beginning. The cheque form did not come out of the customer's cheque book. A loose cheque form returned by an ex-constituent had been used for the purpose of making out a cheque purported to be drawn by the customer. The entries in the register for the issue of such loose forms were so suspicious that it is difficult to believe that the employees of the bank concerned with the encashment of the cheque were acting bona fide. There was no negligence on the part of the customer according to whose resolution, the cheque had to be signed jointly by two persons. The fraud could only be perpetrated because of the complicity of the employees of the bank, no doubt, with the help of one of the officers of the Union. The dishonesty of a particular officer of the Union was not the proximate cause of the loss to the bank. In our opinion, the case of G.C. Kurbar & Another v. Balaji Ramji Dange (A.I.R. 1941 Bombay 274.) referred to in the judgment of the High Court has no application to the facts of this case.

In the result, the appeal succeeds, the judgment of the Patna High Court is set aside and that of the Subordinate Judge restored. The appellants do not want a decree against respondent No. 7. Consequently, there will be no decree as against the said respondent. The other respondents must pay the costs of this appeal.

V.P.S.

Appeal allowed.

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