SUPREME COURT OF INDIA

Punjab & Sindh Bank

Vs.

Vinkar Sahakari Bank Ltd.

Crl.A.No.949 of 2001

(K.T. Thomas and S.N. Variava JJ.)

17.09.2001

JUDGMENT

K.T.Thomas, J.

1. Leave granted.

2. This case involves a queer situation when a Pay Order was dishonoured by the drawer bank. The holder thereof (Punjab and Singh Bank) filed a complaint under Section 138 of the *Negotiable Instruments Act,1881* (for short the Act). The drawer bank and its officials have been arraigned as accused in the complaint. But a single Judge of the High Court of Bombay quashed the complaint mainly on the premise that the instrument (described as the pay order) is not a cheque. The Punjab & Sindh Bank has filed this appeal in challenge of the aforesaid order of the High Court. Besides the premise stated above learned single Judge of the High Court adopted two more grounds for quashing the complaint. One among them is that even assuming that the instrument is a cheque it was crossed and hence the complainant-bank should only have collected the amount and remitted the same to the account of the person shown as payee in the instrument. The other is, the complainant was not a holder in due course inasmuch as no endorsement was made on the instrument in the manner prescribed under Section 50 of the Act and hence the complainant has no locus standi to file the complaint.

3. The short facts leading to the filing of the complaint are these:

> "The first accused in the complaint is a co-operative bank. It drew the Pay Order on 18.12.1992 in a sum of Rs.48.40 lacs, the relevant inscriptions of which are the following: Payees account only - To pay Punjab & Sindh Bank M/s. Poise Leasing and Finance Company Ltd. or order. According to the appellant the said Pay Order was got assigned to the complainant-bank from M/s. Poise Leasing and Finance Company Ltd. When the instrument was presented for clearance before the first accused bank on 18.12.1992 it was returned with the remarks funds uncleared. It was again presented on 6.1.1993 and then it was returned dishonoured with the remarks drawee banks funds with our bank i.e. sponsoring bank, are insufficient. This was

followed by sending a notice to the first accused bank as contemplated in Section 138 of the Act. Since the amount was not paid within the statutory period a complaint was filed on 9.3.1993."

4. On process being served on the respondents a writ petition was filed by them before the High Court of Bombay for quashing the criminal proceedings. But the High Court dismissed the writ petition on 1.7.1999 without prejudice to the rights of the accused to make a plea before the trial court for discharging the accused. Thereafter the accused moved the trial magistrate for recalling the process on the ground, inter alia, that the instrument is not a cheque as per Section 138 of the Act. The magistrate dismissed the aforesaid plea as per his order dated 29.1.2000. When the accused filed a second writ petition in the High Court in challenge of the aforesaid order of the magistrate the learned single Judge allowing the said writ petition passed the impugned order.

5. The first question raised is whether the instrument which is described by both sides as a Pay Order is a cheque within the meaning of Section 138 of the Act. Mr. Shekar Naphde, learned senior counsel who argued for some of the respondents contended that the Pay Order is only a draft issued by the bank and it may at best be a promissory note and is not a cheque.

6. For deciding the said question we have to know what is a cheque. Section 6 of the Act defines a cheque as this: A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. Now we have to look at the definition of Bill of exchange. It is contained in Section 5 of the Act. The first paragraph of this section is enough for the purpose of this case and hence it is extracted below:

> "A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

7. The maker or the drawer of a Bill of Exchange must direct a certain person to pay a particular sum of money. This is the quintessence of a Bill of Exchange. Learned senior counsel for the respondent contended that in every Bill of exchange there must necessarily be three parties, the maker, the payee and the person to whom direction is given to pay. As a draft or a pay order contains only two persons, i.e. the drawer and the payee, it is only an instrument promising to pay a certain sum of money, according to the learned counsel. He made an endeavour to show that a draft may at best be a promissory note but the bid made by him did not succeed as it is a difficult task to bring the draft or a pay order, as in this case, within the purview of the definition of promissory note in Section 4 of the Act. The indispensable postulate for a promissory note is that there should be an unconditional undertaking to pay a certain sum by the drawer. Such an undertaking cannot be read out from the impugned instrument. At any rate the instrument involved in this case is closer to a bill of exchange because of the unconditional order of its maker to the person concerned to pay a certain sum.

8. The postulate in Section 5 of the Act that the Bill of Exchange shall contain an unconditional order directing a certain person to pay need not necessarily refer to a third person. Such a certain person could as well be the bank which has drawn the bill of exchange. So long as the instrument is in the possession of a holder or a holder in due course such instrument would operate as a bill of exchange even if the drawer and the drawee happened to be the same person or banking institution.

9. In this context a reference to Section 85A of the Act is of advantage. We may point out that the said section falls within Chapter VII under the title Of Discharge from liability on notes, bills and cheques. Section 85A deals with drafts drawn by one branch of a bank on another branch of the same bank. The section says that 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 indorsed by or on behalf of the payee, the bank is discharged by payment in due course. It is evident that the section renders such draft a negotiable instrument.

10. Section 131A, which was introduced in the statute by Act 33 of 1947, makes all the provisions for crossing of cheques applicable to the drafts also. That section says: The provisions of this Chapter shall apply to any draft, as defined in section 85A, as if the draft were a cheque. Learned counsel for the first respondent contended that the said section is more in favour of the position that a draft is otherwise not a cheque and it is declared to be a cheque only for the limited purpose of Chapter XIV which deals with crossed cheques. We are unable to agree with the said contention that Section 131A is intended to limit the operation of a draft as a cheque only for crossing purposes. In our view, the said section is intended to widen the scope of crossed drafts as to contain all incidences of a crossed cheque. This is for the purpose of foreclosing a possibility of holding the view that draft cannot be crossed.

11. Even if it is possible to construe the draft either as a promissory note or as a Bill of Exchange, law has given the option to the holder to treat it as he chooses. This can be discerned from Section 17 of the Act which says where an instrument may be construed either as a promissory note or bill of exchange, the holder may at his election treat it as either and the instrument shall be thenceforward treated accordingly. This means once the holder, which in this case is the complainant-bank, has elected to treat the instrument as a cheque it cannot but be treated as a cheque thereafter. This is an irretrievable corollary of exercising such an election by the holder himself.

12. House of Lords had to consider whether a bankers draft payable to order on demand addressed by one branch of a bank to another branch of the same bank, in the wake of Section 82 of the *Bills of Exchange Act 1882*. While holding that such a draft is not a cheque within the meaning of Sections 60 and 82 of the said Act Lord Lindley made the following observations in *Capital and Counties Bank vs. Gordon*[1]:

> "But I agree with the Court of Appeal in thinking that the bank, which is both drawer and drawee of these instruments, is not entitled to treat them as bills of exchange as

defined in s.3 of the Bills of exchange Act, although a holder may sue the bank upon them, and treat them either as bills of exchange or as promissory notes."

13. The said observation was followed by a Division Bench of the Patna High Court in *Bibi Kazmi Begum vs. Lachman Lal Sao and ors.*[2]. In that case, the trial court took the view that when the drawer and the drawee are the same person the instrument drawn would not become a Bill of Exchange. The Patna High Court held that even though such an instrument might not become a bill of exchange between the drawer and the drawee when both were the same person it is well established that the holder of the instrument may treat it as a bill of exchange.

14. Later, a Division Bench of the Calcutta High Court in *Birbhum Central Co-operative Bank Ltd. vs. Pioneer Bank Ltd.*[3], even without reference to the aforementioned observations, adopted the same view. Chakravartti, C.J., speaking for the Division Bench has stated thus:

15. It is well settled that a bankers draft is a bill of exchange and as such it is a negotiable instrument. The issue of a draft is regarded in banking practice as a matter of purchase and ordinarily the relationship between the holder of a Demand Draft and the bank issuing it is that of debtor and creditor. The holder of the draft is a creditor and his remedy is on the draft. In the matter of the *Palai Central Bank Ltd.*[4], P.T. Raman Nayar, J. (as the learned Chief Justice then was) made a survey of the relevant provisions and the case law and then made the following observations:

"However that might be, there is no denying that a demand draft is nothing more or less than a negotiable instrument governed by the provisions of the Negotiable Instruments Act; and on the face of it, the obligations it creates are nothing more than ordinary debts."

16. We are of the opinion that the High Courts have taken the correct view in the above decisions. However, Mr. Shekar Naphde, learned senior counsel for the respondents, invited our attention to the decision of a single Judge of the Bombay High Court in *Maturi Sanyasilingam vs. The Exchange Bank of India and Africa Ltd.*[5] wherein it was held that the demand draft issued by the branch of a bank to its head office or vice-versa is not a cheque nor a bill of exchange. But learned single Judge expressed the opinion that a demand draft may be a bill of exchange if it is issued by one bank drawn on another. The said observation was made in the wake of the contention that the collecting bank could claim protection under Section 131 of the Act. The said decision of the Bombay High Court cannot hold good because the Negotiable Instruments Act was amended by incorporating Section 131A in the said Act.

17. That apart, learned single Judge while relying on the decisions of the House of Lords in Capital and Counties Bank vs. Gordon (supra) restricted himself to the former limb of the observation therein. It is in the latter limb that the House of Lords said that when the draft is in possession of a holder the instrument can be treated as bill of exchange.

18. We therefore dissent from the view adopted by the learned single Judge in the impugned judgment that the pay order is not a cheque.

19. The second premise of the learned single Judge that since the pay order was a crossed instrument the complainant-bank could have only collected the amount and remitted the proceeds to the account of the payee. The said view could not be supported by the learned counsel for the respondents. Hence it is unnecessary for us to dwell into that.

20. The third ground for quashing the complaint is that the complainant was not a holder in due course in the absence of an endorsement made on the instrument in the manner prescribed under section 50 of the Act. This ground was adopted by the learned single Judge without regard to certain relevant provisions of the Act. Section 142 of the Act envisages a complaint to be made in writing either by the payee or the holder in due course of the cheque, as the case may be. Section 8 of the Act defines holder as any person entitled in his own name to the possession of the cheque and to receive or recover the amount due thereon from the parties thereto. We have no doubt that complainant-bank was well within its right to possess the cheque and to receive or recover the amount covered by the instrument. Holder in due course means a person who for consideration became the possessor of a cheque if payable to bearer before the amount became payable. (vide Sec.9).

21. In this context reference has to be made to Section 118(g) of the Act which contains a mandate that until the contrary is proved the holder of a negotiable instrument shall be presumed to be a holder in due course. Thus there is no escape for the court from drawing such presumption.

22. It is undisputed that the complainant-company is the holder of the instrument on its own right. As such it could be a holder in due course also until the concerned party adduces evidence to rebut the presumption. It is of course open to the respondents to rebut the presumption in the trial but till then the High Court could not say that the complainant is not a holder in due course at all.

23. For the aforesaid reasons we allow this appeal and set aside the impugned judgment. The trial shall now proceed to reach the final judgment without any more delay.

[1]*(1903 AC 240)*
[2]*(AIR 1930 Patna 239)*
[3]*(AIR 1956 Calcutta 615)*
[4]*(AIR 1962 Kerala 210)*
[5]*(AIR 1948 Bombay 1)*