

CALCUTTA HIGH COURT

Brahma Shum Shere Jung Bahadur

Vs.

Chartered Bank of India

Suit No. 936 of 1947

(Bose, J.)

01.06.1955

JUDGMENT

Bose, J.

1. This is a suit for a declaration that the accounts of the plaintiffs with the defendant No. 1 have been improperly debited with, and the plaintiffs are not liable for, the sum of Rs. 2,34,081/- or any portion thereof and in the alternative for a decree against the defendants Nos. 1, 2 and 3 for Rs. 2,34,081/- for wrongful conversion or for moneys had and received or for damages.

2. The case of the plaintiffs is that the plaintiffs had at all material times an account with the defendant No. 1, the Chartered Bank of India, Australia and China. The terms and conditions of the account inter alia were that :

- (a) The defendant No. 1 would collect the cheque in the name of the plaintiff No. 1 or in the names of the plaintiffs jointly and. credit the amounts collected to the said account.
- (b) The defendant No. 1 would up to limits fixed from time to time, advance monies by way of 'overdraft against approved shares and" securities held in the names of the plaintiffs.
- (c) The account would be operated by the plaintiff No. 1 during his lifetime and after his death by plaintiff No. 2.
- (d) The defendant No. 1 would charge interest at the usual rate, and commission.

3. The defendant No. 1 held in deposit various shares and securities belonging to the plaintiffs against the said overdraft account but prior to July 1946 these shares and securities were not considered sufficient, For the purpose of allowing an overdraft to that extent of Rs. 70,000, and the defendant No. 1 declined to allow any overdraft to the extent of Rs. 70,000/- unless other approved securities were deposited. But no other securities were in fact deposited.

4. On 1-7-1946 the plaintiff No. 1 drew a cheque No. EP 867583 on the defendant No. 1 for Rs. 256/- payable to the defendant No. 4 Mr. J.M. Das Gupta or order, and the cheque was cent by

post, but the cheque did not reach the said payee. The plaintiff No. 1 was however informed by the defendant No. 1 by letter dated 24-7-1946, that after paying a sum of Rs. 2,34,081/-, the plaintiff's said account had been overdrawn to the extent of Rs. 2,19,460/5/3.

5. It is alleged that the plaintiffs did not draw any cheque for or authorise any payment of Rs. 2,34,081/- but the said cheque for Rs. 256/- was, after despatch, intercepted and stolen, and the amount and the name of the payee had been fraudulently, materially and obviously on the face of it altered to Rs. 2,34,081/- with the name of the payee as S. Dass and Co. in place of J. M. Das Gupta, the original payee, and the payment by the defendant No. 1 of the said sum of Rs. 2,34,081/- on the said cheque was unlawful and unauthorised and was negligent and in breach of duties to the plaintiffs and further such payment and the debiting of the said amount against the plaintiffs, amounted to wrongful conversion by the defendant No. 1.

6. It is further alleged that the defendant No. 2 (S. Dass and Co.) and the defendant No. 3 (Hindusthan Industrial Bank Ltd., through whom the collection of the cheque was made), are also liable for wrongful conversion or unlawful appropriation of the proceeds of the cheque.

7. The present suit was filed on 16-4-1947. In the written statement filed by the defendant No. 1 on 10-6-1947 it is denied that any limits were at any time fixed on the overdraft and it is stated that the extent of the overdraft was governed by the value placed by this defendant on the shares and securities and by the value placed by the defendant on the plaintiff's credit. It is further denied that this defendant declined to allow overdraft to the extent of Rs. 70,000/- against the securities and shares of the plaintiffs lying with this defendant, and it is pointed out that the plaintiffs being valued customers of high standing, status and credit, the defendant was not in a position to refuse to honor the plaintiffs' cheques merely on the ground that the shares and securities did not come under the category of approved securities even though they gave sufficient cover according to the valuation put by the defendant. The charge of negligence, want of authority, and wrongful conversion is denied. It is further denied that there were any suspicious circumstances about the cheque which appeared ex facie to be a valid cheque and it is stated that the payment was made in due course. The signature of the drawer being a genuine one, the payment of the said cheque was duly authorized and was to be treated as a loan or credit asked for by the plaintiffs and duly given.

8. The defendant No. 3 (Hindusthan Industrial Bank Ltd.) also filed a written statement on, 13-6-1947. It is denied in this written statement that the cheque was fraudulently or materially altered and it is stated that "this defendant collected the cheque on behalf of its constituent S. Dass and Co. in good faith and without negligence.

9. The following issues were raised at the hearing :

(a) Was the overdraft to the plaintiffs in the account in suit object to limits to be fixed from time to time by defendant No. 1 ?

(b) Was such overdraft allowable against only approved shares and securities held in the name of plaintiff No. 1 or in the joint names of the plaintiffs ?

2. Was the payment of Rs. 2,34,081/- in respect of the cheque in question authorized or made in due course ?

3. (a) Were the alleged alterations on the said Cheque obvious on the face of it ?

- (b) Was there any suspicious circumstance appearing on the face of the said cheque ?
 - (c) Before payment of the said cheque was defendant No. 1 aware that it had been intercepted or stolen or fraudulently or materially altered without the knowledge or consent of the plaintiffs in the manner alleged in para 6 of the plaint or at all ?
 - (d) Are the plaintiffs discharged from responsibility for what occurred to the cheque between its signature and presentation for payment ?
4. (a) Was the payment of the said cheque or debiting the plaintiffs' account with the amount thereof tantamount to a wrongful conversion of the plaintiffs' moneys ?
- (b) Was the alleged loan or credit as pleaded in para 11 of the plaint asked for or authorized or received by the plaintiff or covered by the agreement between the parties or debitable to the plaintiffs' account ?
5. To what relief, if any, are the plaintiffs entitled ?

10. The plaintiffs Brahma Shum Sher Jung Bahadur Rana gave evidence before this Court on 21-9-1948. He has stated that the terms and conditions of the account as laid down in para 1 of the plaint are correct. He has stated that he applied; for an overdraft to the extent of Rs. 70,000/- by his letter dated 18-4-1946, but the defendant No. 1 refused to allow such overdraft on the strength of the shares and securities then lying with them, by their letter dated 24-4-1946. The witness did not ask for any overdraft after this nor did he deposit any further securities with the Bank. After the present suit was instituted the defendant No. 1 sent to the solicitors of the plaintiffs a list of shares and securities as on 12-7-1946. in which the Bank put its own valuation. The list shows that some of the securities had market quotations or in other words, marketable, but others had no such quotation in the market. It is the practice to ascertain the value from existing market reports. It appears that the Bank put the valuation of the securities at Rs. 2,66,000/- on 12-7-1946 (Q. 27). The witness has stated further that the counterfoil of the cheque in suit was written out by him. The cheque for Rs. 256/- was drawn for payment of the fees of Doctor J.M. Das Gupta for medical attendance. The cheque was drawn in Nepal and the witness wrote out the body of this cheque in his own hand. It appears however from the cross-examination of this witness that there are certain counterfoils which were written by other person and they are not in the handwriting of the witness (Q. 291-303). The witness has proved some correspondence and telegram, and upon receiving the information that his account had been debited with; Rs. 2,19,460/5/3, he ultimately came down to Calcutta and inspected the cheque in the second week of September 1946 in the office of the sub-Agent of the Bank, Upon inspection he found that the entire body of the cheque except the signature had-been written out by an unknown hand, and even the crossing of the cheque had been done in some other hand, although the witness had crossed the cheque himself when he originally drew the cheque.

11. There were distinct yellowish marks under most of the letters, and traces of the previous writing were visible in some places (Q. 108-110 and Q. 319-324). The witness has said further that he does not know any firm of the name of S. Dass and Co. and had no transaction at any time with any such firm. On 12-7-1946 when the cheque was cashed, the plaintiffs had only about Rs. 14,000/- and odd to their credit in the account. It is the evidence of the witness that he did not draw any cheque for over one lakh before this. The witness has admitted that besides the account with the Bank in suit, there were certain joint accounts in the Bank in which he and his father and others were interested and one of such accounts was a big account. The witness has

given his relationship with Maharaja of Nepal and has admitted that he and his father have been conferred some titles by the British Government (Q. 147-155). The witness had admitted that certain powers of attorney were executed in favour of the Bank. (Q. 169-188). The witness has not been able to produce any correspondence to show that at any point of time any limit was fixed about the extent of the overdraft (Q. 204-210). The witness has been asked some questions about the Securities and his answers are given in questions 214-233. Although the witness has suggested in his evidence in this suit that except the signature everything else was altered in the cheque, in his evidence before the Sessions Court, he stated that only the amount and the name of the payee of the cheque were altered (Q. 255-267). The witness has stated that the Bank allowed them over-draft on the existing securities up to Rs. 41,000/- but not up to Rs. 70,000/- (Q. 334-343). But the answer of the witness to Q. 345 is not quite intelligible in the context in which it occurs. His subsequent answers however make the position clear (Q. 347-377).

12. James Shaw Forsyth, the Sub-Agent of the defendant No. 1 (Bank) at Clive Street Branch has also deposed in this case. He has stated that the plaintiffs are highly valued customers of the Bank and they belong to the ruling family of Nepal. The plaintiff No. 2 is second in line of succession. Their financial integrity is very sound and they are customers of the bank for over twenty to thirty years. The plaintiffs have several other joint accounts in the Bank, besides the account in suit. The account in suit was opened on or about 17-8-1922 (Ex. 2). No overdraft limit was fixed at any time in respect of this account and the overdraft was granted against securities deposited from time to time and also on the strength of the value placed on their credit in connection with the Nepal ruling family. The securities were of two categories marketable and non-marketable. The non-marketable securities were also of considerable value. The cheque in suit (dated 1-7-1946) was presented through the Comilla Banking Corporation which was a scheduled bank and the latter had certified on the back of the cheque that the amount had been credited to the payee's account. The cheque on the face of it did not give any indication that the payee S. Dass and Co. was not the real payee or that the amount of the cheque was other than Rs. 234081/-. The cheque was passed by Mr. Hodge who was the Passing Officer at that time. This Mr. Hodge was in the service of the bank for about five months only find he resigned and left for South Africa in August or September 1946 but his whereabouts were not known to the witness. This statement is not correct inasmuch as it appears from the evidence of Mr. Hodge that the latter had left for South Africa in April 1947. This witness has stated further that as there was not sufficient fund to meet the cheque, an entry was made by the ledger clerk in the overdraft Passing book (Q. 78). The cheque was then sent to the witness with the overdraft passing book. The witness turned up the records, saw what securities there were, and 'after taking out fresh valuation of everything, he agreed to pay the cheque and initialed on it at the bottom left hand corner. The witness has made it clear that before the cheque was passed for payment, revaluation of the securities was made (Q. 81-82). The witness did not notice anything suspicious or any alterations on the face of the cheque. The witness was present when the plaintiff Bramha Sham Sher Jung Bahadur came to inspect the cheque at the Bank in the middle of September 1946. At that time Mr. Taskar the Agent of the Bank, Mr. Bensly of Sandersons and Morgan, and two other gentlemen who came with Major General Brahma were also present.

13. It appears that Mr. Taskar has retired from service and is not available as a witness. The witness has admitted that there is a Securities Ledger wherein the list of securities is entered. The witness was asked as to why information about a debit of Rs. 50/- made in the account of the plaintiffs on 12-7-1946 was immediately sent to the plaintiffs but intimation about the debit of Rs. 2,34,081/- made on the same date, was not sent till 24-7-1946, and the answer of the witness

is that when a cheque is drawn it is understood that the drawer knows that the debit will be made and in this particular case the bank did not advise the General Brahma, as he was a member of the ruling family (Q. 107). I find it difficult to follow the true implications of this last part of this answer. The witness has also stated that it was not the duty of the bank to inform the police.

14. In course of cross-examination the witness has said that valuation or revaluation of securities is done by a clerk and it is then checked by an officer. The clerk at the material time was Netai Chandra Sil and the officer concerned was McKakni but none of these persons have been called. Entries are made about the valuation and the checking, in the Security Valuation Book (Q. 143), but this book is not produced. The witness suggests that the extent of the overdrawing is a matter which depends entirely on the credit placed on the party concerned (Q. 155-158). The witness was asked to get a list of all joint accounts of the plaintiffs prepared (Q. 190-196). An attempt was made during the hearing before me, by the learned counsel For the defendant No. 1 to put in a list of such joint accounts by calling a witness For the purpose, but the learned counsel For the plaintiffs strongly objected to this on the ground that as Mrigendra Sham Shere, who is not a party to this suit is also interested in the joint accounts, the accounts could not be disclosed. This Court thereupon disallowed the disclosure of such accounts. Although in his examination-in-chief the witness stated that Mr. Hodge was the Passing official, in course of cross-examination, he has suggested that he did not pass the cheque but merely examined it (Q. 219-220). I am unable to follow the implications of this answer. On being referred to the letter of 24-4-1946 written by the Bank in reply to the letter of 18-4-1946, the witness has stated that by the letter of 24-4-1946, the Bank merely pointed out the position as to the securities but did not decline to allow an overdraft (Q. 232). It is to be noted that the personal credit of the-plaintiffs was there all these months and yet the defendant bank demanded further securities before allowing the plaintiffs to overdraw to the extent of Rs. 70,000/-. The witness has admitted that the position was exactly the same on the date when the cheque in suit was cashed, as it was on 24-4-1946 (Q. 238). The witness has stated that the non-marketable securities were valued at their face value as an exceptional case because of the plaintiff's credit (Q. 266-268) but in the letter of 24-4-1946 the suggestion was otherwise (Q. 271-272). The witness's answer to Q. 278 is hardly worth, any credit. It sounds rather curious (see also Q. 304).

15-23. (His Lordships then referred to the evidence of other witnesses including a Handwriting Expert and continued as follows) : Mr. B.K. Ghose one of the learned counsel For the plaintiffs objected to the admissibility of the negatives or the enlarged photographic prints on this ground that the photographer, who had taken the photographs, has not been called, but I do not think that the absence of the photographer makes the photographs inadmissible.

24. It is true that whether a photograph is, a correct reproduction of the original depends on many factors such as the correctness of the lens, the state of the weather, the skill of the operator, the colour of the impression, the purity of the chemicals, accuracy of forming the angle at which the original was inclined to the sensitive plate, the possible fraud of the operator etc. But the learned counsel For the plaintiffs has not chosen to cross-examine the witness Mr. Samajdar with regard to any such matters. The witness had stated that the photographs were taken in his presence and he had large experience of how photographs are taken. Yet no attempt was made to get the relevant facts from the witness, or to challenge the accuracy of the photographs.

25. As the original cheque is also before the Court, I think, the magnified photographic copies

can be safely received in evidence, inasmuch as the accuracy of the copies can be readily tested by comparison with the original if necessary.

26. Mr. B.C. Mitra, the learned counsel For the defendant No. 1 has referred to Osborn on "Questioned Documents" (2nd edition 8th Impression) at p. 372 for showing that ink flow-back is often mistaken as retouching and so this error should be guarded against, but as the Handwriting expert Mr. Samajdar who has apparently large experience of examination of the handwriting of persons, has stated that there are some signs of retouching, I do not think that the Court will be justified in presuming that Mr. Samajdar had mistaken cases of ink flow-back as cases of retouching. However, as I have pointed out already, there is no evidence that these retouchings were there at all or were visible in the manner in which they appear now, at the time when the Bank honoured the cheque or the plaintiff (Major General) and others inspected the cheque in September 1946. There is no such case made at any stage prior to 17-5-1955 when Mr. Samajdar was cross-examined.

27. Mr. B.C. Mitra also relied on Osborn's) book at P. 634 for showing what proof is required of photographs to make them admissible in evidence. The learned counsel referred to the following passage :

"Photographs may be admitted without objection but it is usually necessary to prove them. This is done not only by the one who made them testifying that he made them and that they are 'correct' but they can be proved by any competent witness who can testify that they are correct.

The witness tells what the photograph is made from whether it is smaller, the same size, or larger, than the original and just how much if any it differs in size. Three or four questions are usually sufficient to prove ordinary photographs. 'Is this an accurate photograph is the final and essential question.

If photographs are unusual in any way then the process of making them should be described in detail. A photograph is considered to have been made by one technically qualified to do such work who can testify that it was properly arranged in position before the camera, accurately focussed, and then given the proper time of exposure.

It is not essential that the plate be developed by the one who proves the photograph, or that the prints should actually be printed from the negative by him, if he has inspected the negative to see that it is an accurate reproduction of the original and inspected the prints to see that they are accurate impressions of the negative. As suggested above, photographs are now often admitted on the evidence of those who did not make them if it is shown that they are accurate reproduction of the original. Photographs are now rarely excluded."

28. The learned counsel Mr. B.C. Mitra also referred to Phipson on Evidence (7th Ed. p. 386), Wigmore on Evidence (2nd Ed. p. 794), - *R. v. Tolson*''', and also to Sections 3, 59, 60, 61, 62 and 64, Indian Evidence Act. Mr. Mitra has argued that the Negatives are primary evidence but it appears to me that the negatives and the photographic prints are secondary evidence of the cheques which is the original and the primary evidence (S. 63 and Illus. (a), Evidence Act). I have however no doubt that the photographs have been properly proved and they have been

properly tendered in evidence. No argument has been advanced by the plaintiffs' counsel against the admissibility of the photographs or the negatives at the time of the final address to the Court.

29. Issue No. 1 (a) : The plaintiff Major General Sham Shere Jurig Bahadur Rana has admitted in course of his evidence that the joint account in suit was opened in or about August 1922. The form of the application made for opening this account is dated 17-8-1922 and is marked as Ex. 2. In para 1 of the plaint it is stated that the terms and conditions on which the account was opened were as set out in clauses (a), (b), (c) and (d) in the said paragraph. The Major General has admitted that the terms referred to in para 1 of the plaint are not to be found in any document but his suggestion is that there had been correspondence on such matter and the last one was that in which the Bank refused to give Rs. 70,000/- but he has not preserved the previous correspondence on this subject. It is however quite clear from the answers of this witness to questions 206-210 that no limit was actually fixed in respect of this overdraft which the plaintiffs wanted in respect of this joint account. The two letters dated 18-4-1946 and 24-4-1946 at pp. 9 and 10 of Ex. A do not show that there was any definite limit fixed by the Bank in respect of the overdraft.

30. Mr. Forsyth has tried to make out that no limit was fixed in respect of the overdraft account.

31. Mr. Sanyal has drawn my attention to several questions and answers in the deposition of the plaintiff No. 1 and of Mr. Forsyth (plaintiff Q. 8-20, 204-209, 335-342, 343 and 374 and Forsyth Q. 35-41, 45, 47, 81, 120, 134, 137, 148, 154, 155-185, 189, 200, 211, 221-223, 226, 237-239, 260, 271). The answer of Mr. Forsyth to Q. 34 is also material.

32. Mr. Sanyal also wants me to construe the letters dated 18-4-1946, 24-4-1946 and 24-7-1946 as giving indications that there had been some limit fixed in respect of the overdraft account.

33. Now the Letter of Hypothecation or Lien dated 22-4-1937 shows that an overdraft was subsisting at that point of time and the Words, "during the currency of such overdraft" indicate that it was contemplated that the overdraft would continue in future until put an end to.

34. Then it appears that even after the lapse of about nine years the overdraft was still continuing and the plaintiff No. 1 by his letter dated 18-4-1940 was giving intimation

¹(1864) 176 ER 488

beforehand to the bank, that within a month or so the overdraft might reach even sixty or seventy thousand rupees. There are no words of any request contained in this letter asking the bank to allow an overdraft to the extent of Rs. 70,000/- but the plaintiff makes it clear in the concluding sentence of para 2 of this letter that he was writing this just to let the Bank know the situation pre-hand in case the occasion arises, so that the bank may understand the situation.

35. The Bank however by their letter dated 24-4-1946 construed the plaintiff's letter dated 18-4-1946 as a request for an overdraft to the extent of Rs. 70,000/- and stated that the Bank was always prepared to meet the requirements of the plaintiff No. 1, but pointed out that the securities then held by them did not come under the category of approved securities and in view of this the plaintiff No. 1 would undoubtedly arrange to deposit further marketable shares as cover for the advance required and it was upon receipt of such, further marketable shares that the application of the plaintiff No. 1 would receive the prompt and immediate attention of the bank.

36. Thus this letter makes it clear that although no maximum limit had been fixed in respect of the overdraft, the bank wanted further securities to be deposited if the plaintiff wanted to overdraw to the extent of Rs. 70,000/-.

37. Then after the cheque in suit for Rs. 2,34,081/- was paid by the bank, the bank by their letter of 24-7-1946 intimated the plaintiff No. 1 that the account had been overdrawn to the extent of Rs. 2,19,460/5/3, and if the intention of the plaintiff was to avail himself of overdraft facilities to the extent indicated (i.e., up to Rs. 2,19,460/5/3) it would be necessary to forward to the bank approved securities of the market value of about Rs. 3,00,000/-.

38. This letter also shows that no maximum limit had been fixed at any time but if the overdraft amount was to remain at that figure of Rs. 2,19,460/5/3 then additional securities would have to be deposited. It is clear from the evidence on record that at the time this letter was written the bank did not know that the cheque had been forged or altered and therefore there is no reason to suppose that the bank had been manipulating the language of the letter with any ulterior object.

39. In my view these three letters of April and July 1946 give clear indication about the real attitude of the parties with regard to the overdraft account. There was no maximum limit fixed at any time and the bank was prepared to meet the requirements of the plaintiff on the understanding that sufficient securities would be deposited when necessary to cover the extent of the overdraft. This was the nature of the arrangement.

40. Issue No. 1(b) : The Major General has admitted that he is an old customer of the Chartered Bank and besides the account in suit there are other joint accounts in the bank standing in the name of the witness, his father and his brother. The witness was asked whether the accounts were for substantial amounts but his answer has been that he did not know what amounts were lying in such accounts. The Major General has also pretended that he does not know what shares and securities are held by the bank in respect of these joint accounts. His evidence is that he knows only about the amount and the securities held by the bank in respect of the joint account in suit but subsequently he has admitted this much that his father has a big joint account in the bank (Q. 124-137). The witness has given his interpretation of the words "approved shares and securities" in answers to Q. 211-213. He was shown the list of securities at pp. 42 and 43 of Ex. A and was asked whether he accepts the valuation put by the bank on those securities but his answer has been that he cannot accept the valuation put by the bank as the correct valuation, and his suggestion further is, that the bank has deliberately inflated the valuation after the encashment of the forged cheque in suit, in order to convey the impression that there was sufficient cover to enable the bank to honour the cheque of Rs. 2,34,081/- (Q. 214-233).

41. It is to be noted however that in the letter of the bank dated 24-7-1946 the valuation put in respect of the "sundry shares" held by the bank was Rs. 1,18,000/- and the bank pointed out that if the intention of the Major General was to have an overdraft facility to the extent of Rs. 2,19,460/5/3 which was the amount to which the account had been overdrawn on 12-7-1946 then the plaintiff would have to forward approved security of the present market value of about Rs. 3 lakhs. Thus this letter indicates that the plaintiff's suggestion to the effect that the bank had inflated the valuation of the securities after the encashment of the cheque in suit, has considerable force. Of course Mr. Forsyth has explained this letter in answer to Q. 304 and has stated that as

the bank was thinking of permanent overdraft in this letter so further securities were asked for.

42. The letter of hypothecation dated 22-4-1937 at p. 8 of Ex. A is very wide in its terms. It shows that in respect of the overdraft account in suit and in respect of all other claims that the bank might have against the plaintiffs at the head office of the bank or in any of its branches and agencies, the plaintiffs were hypothecating all the securities and properties of any kind belonging to the plaintiffs or any documents of title to such properties which were in the possession of the bank. It was agreed and understood that all these might be held as cover against the indebtedness of the plaintiffs and the bank would have full authority to sell the said securities and properties or any part thereof to cover such indebtedness and to have such indebtedness discharged out of the sale proceeds. The Major General has stated with reference to this document that the bank could touch under this document all kinds of securities approved or otherwise in case of genuine indebtedness of the plaintiffs to the bank (Q. 236-251).

43. Mr. Forsyth's evidence on this point is in answer to Q. 35-41 and Q. 190-195 and Q. 205-209.

44. I hold that the defendant No. 1 could avail of all kinds of securities whether approved or otherwise as cover For the amount of the overdraft.

45. Issues Nos. 2, 3 (a), (b), (c), 4 (a) and (b) : Section 85(1), Negotiable Instruments Act provides that :

"Where a cheque payable to order purports to be endorsed by or on behalf of the payee, the drawee is discharged by payment in due course."

46. The expression "payment in due course" is defined in Section 10, Negotiable Instruments Act as follows :

"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".

47. The other section relevant to the issues involved in this case is Section 89 which is as follows :

"Where a Promissory Note, Bill of Exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment, which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon, and such payment shall not be questioned by reason of the instrument having been altered or the cheque crossed."

48. The evidence of the plaintiff Major General Sham Sher Jung Bahadur Rana makes it clear that he did not always write out the body of the cheque nor did he always fill in the counterfoil of the cheques in his own hand. Sometimes his clerk used to write out the cheques and the corresponding counterfoils, and the plaintiff Major General Brahma used only to sign the cheques in such cases (Q. 291-304). It is admitted that the cheque in suit bears the genuine signature of the plaintiff Brahma. Therefore the mere fact that the body of the cheque appeared to be in the handwriting of a person different from the drawer of the cheque was not a matter which could have roused suspicion in the mind of the bank officials who had anything to do with the cheque. The Bank had occasion to cash or pay some cheques, the bodies of which were written by persons other than plaintiff No. 1 so recently as in June 1946 and therefore the difference in the handwriting between the signature of the drawer and the body of the cheque was not an extraordinary circumstance which would have put the bank on any inquiry. The next question is whether there was any other factor which, should have indicated be the rank that the cheque was not in order and therefore the payment could not be regarded as payment in good faith and without negligence.

49. The evidence of the plaintiff Sham Shere is that when he inspected the cheque on 14-9-1946 at the office of the Sub-Agent of the Bank he noticed that there were traces of alteration and tampering visible with naked eye at several places (Q. 108-110, 274-287 and Q. 319-324). It is to be noted however that neither Mr. Joshi nor the other gentleman who accompanied the Major General on 14-9-1946 and were present at the time of inspection of the cheque have been called.

50. Mr. Porsyth and Mr. Bensly who were present at the time of inspection have, however, stated that no traces of any alterations were visible at the time and the cheque appeared on the face of it to be in order. Mr. Samajdar could not detect any discoloration or traces of alterations in 1941 with his naked eye when he examined the cheque in 1947.

51. Mr. Hodge has also stated that when he passed this cheque on 12-7-1946 there was no suspicious look about the cheque but at the time he was giving evidence before the Commissioner in South Africa he noticed some stains and discoloration and possibly some little traces of old and original writing, which if noticed at the time of passing the cheque, would have deterred him from passing the cheque straightaway, and would have led him to refer the matter to a higher official. This witness was examined on 17th and 18th of March 1953, that is, about six years and eight months after the date when the cheque was paid, and so it is quite possible that the effect of the chemical process applied to the cheque in order to obliterate the original writing, had become more visible and prominent than what was visible when the cheque was passed for payment on 12-7-1946. The evidence of the plaintiff Brahma Sham Shers Jung was recorded on or about 21-9-1948 and at that time also the Major General noticed the yellow stains and the traces of alterations and curiously enough some of the places where the stains and traces of alterations are alleged by the plaintiff Brahma Sham. Shere Jung Bahadur and Mr. Hodge to be visible, are identical. It is, however, unlikely that some of these stains and traces of original writing were visible at the time the cheque was passed. It is to be noted that in the letter of the plaintiff's solicitors' dated 17th/18th September 1946 which was written practically contemporaneously with the inspection of the cheque by plaintiff 1 in the middle of September 1946, there are only vague references to certain traces of alterations and traces of obliterations of the original writings being still visible, but no particulars of the alterations or obliterations are specified. This rather suggests that no traces of alterations or obliterations were visible in September 1946 but these became prominent and visible with the passage of time and became

detectable later in 1947 or 1948. Defendant is solicitors by their letter of 23-9-1946 asked for particulars of the alterations and the obliterations, but the plaintiff's solicitors in their letter dated 26-9-1946 carefully avoided giving such particulars.

52. It is true that the cheque was for a large amount of Rs. 2,34,081/- and it is in evidence that no cheque for an amount exceeding rupees one lakh was drawn previously on this account. (Q. 122-123 of Brahma Sham Shere Jung Bahadur). But since there were other joint accounts in the names of the plaintiff and others, and cheques for amounts like the present one, might have been drawn on such other joint accounts and further as it is not possible for the bank officials to remember details or particulars of all previous drawings in respect of a particular joint account which has been in existence for 24 years, too much stress cannot be laid on this aspect of the matter.

53. The fact however remains that the fund lying to the credit of this joint account on the day when the cheque in suit was paid was Rs. 14,000/- and odd. So it could not be said that there was sufficient fund of the drawer in the hands of the Bank which would impose a liability on the drawee of the cheque, to honour it, upon presentation, and in default of that, to incur any liability for compensation to the drawer of the cheque as is contemplated by Section 31, Negotiable Instruments Act. It is true that there was an arrangement between the plaintiffs and the bank for an overdraft but it appears that when the plaintiff Brahma Sham Shere communicated his desire by his letter dated 18-4-1946 to overdraw to the extent of about Rs. 70,000/- in this account, against the securities then lying with the bank in respect of this joint account, the bank's Sub-Agent by his letter dated 24-4-1946 called for further deposit of marketable shares as cover for the advance of Rs. 70,000/- and pointed out that upon receipt of further shares, the application for this increased overdraft would receive the prompt and immediate attention of the Bank. This letter thus gives clear indication that in April 1946 the bank was reluctant to allow the plaintiff Brahma to overdraw to the extent of Rs. 70,000/- in this account, despite the fact that the plaintiffs were valued customers, and they had great personal credit and had other joint accounts in the bank. But in July 1946, the Bank suddenly changed its mind, and although no further shares or securities were deposited with the Bank after 24-4-1946, the bank became all of a sudden, very conscious of the, high personal credit and status of the plaintiffs, revalued the shares and securities then and there, at the sum of Rs. 2,66,279/- and thought it proper to make the payment of such a huge sum of Rs. 2,34,081/- against the cheque in suit. It is clear that normally even if a customer has several accounts in the bank the banker has no right to combine the accounts without notice (see - '*Greenhalgh v. Union Bank of Manchester*'², but see the comment of Mr. Paget in his book "Law on Banking", on this case at pages 379-380, 5th Ed.) It is to be noted however that in the case before me the letter of Hypothecation dated 22-4-1937 authorised the Bank to avail itself of all securities or monies lying in the other accounts of the plaintiffs.

54. It is also significant that although the plaintiff Brahma requested the bank by his letters dated 16 and 17-8-1946 to seek the assistance of police in case any foul play was suspected, the bank did not take any steps in that direction but later asked the plaintiff to inform the police. But both Mr. Porsyth and Mr. Bensly have given their explanation and as these explanations are not altogether unsatisfactory, the Court will not be justified in accepting the suggestion of the plaintiffs that the bank did not take any steps because the bank wanted to shield the offenders which included some employees of the Bank also. It appears to me that it will be rash, for this Court to come to any such conclusion.

55. A point was made by Mr. H.N. Sanyal that as the banker (defendant 1) had not sufficient funds of the plaintiffs in the account to honour the cheque for Rs. 2,34,081/- at the time it was presented to the Bank for encashment, there was no liability on the banker to pay and as a banker must be "liable to pay" before Section 89, Negotiable instruments Act is attracted, the banker (defendant 1), cannot seek the protection of Section 89 in this case. I do not think, there is any force in this contention. It is true that normally a person who deposits money in a current account with the bank can draw cheques only to the extent of his deposits. But he can draw cheques even for larger amounts than the extent of his deposits if the bank is prepared to extend him further credit. If the Banker enters into an agreement with the customer to allow the customer to overdraw in the account and undertakes the obligation to meet cheques in respect of the overdrawn amounts there is undoubtedly liability in the bank to meet such cheques. Thus the banker's obligation to honour the customer's cheques depends entirely on the contract between the banker and the customer. When a banker has in his possession securities of the customer in his hands he will be liable, even if he has no cash balance of the customer in the account, when in the previous course of similar dealing he honoured the customer's cheques. It is not necessary that the customer must on each occasion make a request for an overdraft and the bank must accede to such request before the cheque For the overdraft can be drawn. If there is a previous agreement allowing the customer to overdraw that is enough to impose a liability on the bank to honour the cheques For the excess amounts to the maximum amount of the limit of the overdraft, if there is such a limit.

56. It is also settled law that if a banker without justification dishonours his customer's cheque, he makes himself liable to compensate the customer for injury to his credit.

²(1924) 2 KB 153

57. In the case of - '*Bouse v. Bradford Banking Co. Ltd.*³', Lord Herschell L.C. in explaining the nature of an overdraft account made the following observations (page 595 (bot) -596) :

"It is not necessary to consider what the rights of the bank were with regard to their debtors when they had agreed to an overdraft. The transaction is of course of the commonest. It may be that an overdraft does not prevent the bank who has agreed to give it from at any time giving notice that it is no longer to continue, and that they must be paid their money. This I think at least it does; 'if they have agreed to given an overdraft they cannot refuse to honor cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to foe withdrawn. That effect I think it has in point of law; whether it has more than that in point of law it is unnecessary to consider."

Now the fact remains that there is nothing to show that there was at any point of time any limit fixed in respect of the overdraft. It is true that the bank demanded further securities when plaintiff I desired to overdraw to the extent of Rs. 70,000/- taut there is no evidence to the effect that any definite limit was put at any time to the extent to which the plaintiffs would be entitled to overdraw in respect of the account in suit. The bank might nave thought that since plaintiff 1 had actually drawn and put into circulation the cheque for Rs. 2,34,081/- and the cheque had been presented for encashment through a clearing bank, the bank could not put plaintiff I into discredit by dishonoring the cheque (Q. 110 of Porsyth), especially as the bank had faith in the solvency of

its customer and it expected that the deficiency in the securities would be made good, or funds would be put in, as soon as the bank called upon the customer to do so.

58. It is true that one finds it difficult to accept the case of defendant 1 that upon revaluation of the securities suddenly made on 12-7-1946 the bank found that the securities were sufficient and so this justified the bank in paying the cheque, but it is possible that this case has been invented to further strengthen the case of defendant 1 and to justify the conduct of the bank in honoring the cheque on 12-7-1946. So this does not conclusively establish the fact that the bank was acting in bad faith or negligently. Mr. Porsyth has repeatedly said that in making the payment the bank relied on the personal credit of the customer but although this case is weakened by the attitude of the bank taken in their letter of 24-4-1946 it is not altogether improbable that taking into consideration the fact that the cheque had already been drawn and issued by the customer and that such cheque had been actually presented for encashment the bank changed its previous attitude (taken in the letter of 24-4-1946) and condescended to make the payment, in view of the existing overdraft arrangement which imposed a liability to honour the cheque.

59. I am unable to hold that the cheque on the face of it disclosed traces of alterations or obliterations at the time it was presented for encashment and I am inclined to hold that the payment made was a "payment in due course" and was according to the "apparent tenor of the cheque" and defendant 1 is therefore, entitled to debit the account of the plaintiffs in the manner as has been done by defendant 1.

³(1894) AC 588

60. Mr. Sanyal has also submitted that there were quite a number of unusual circumstances which should have put defendant 1 on enquiry and the absence of such enquiry on the part of defendant 1 deprives it of the protection under Section 89, Negotiable Instruments Act. It is pointed out that plaintiff 1 had not drawn any cheque exceeding Rs. 1,00,000/- (one lakh) prior to the cheque in suit. Defendant 1 had refused an overdraft of Rs. 70,000/- by their letter dated 24-4-1946 under a set of circumstances which continued to be the same on 12-7-1946 when the cheque for Rs. 2,34,081/- was presented for payment. No further securities had been put in since April 1946 and no fresh request for any further overdraft had been made by plaintiff 1. There was no compulsion on defendant 1 to honour the cheque. So if under these circumstances, defendant 1 abstained from making any enquiry from plaintiff 1 before making the payment, such payment cannot be regarded as payment made in due course.

61. Mr. Sanyal also relies on the observation of Scrutton, L.J. in the case of - '*A. L. Underwood v. Bank of Liverpool*⁴', to the following effect :

"If banks for fear of offending their customers will not make inquiries into unusual circumstances they must take with the benefit of not annoying their customer the risk of liability because they do not enquire."

62. But this observation is to be understood in the context in which it was made. In this case of (1924) 1 K.B. 775, which was a case of alleged negligence of a collecting banker, one Mr. Underwood, who was the sole director of a limited company, deposited 45 cheques which were on the face of them drawn in favour of the Limited Company, into his private account with the defendant bank, 'after endorsing the same as such sole director, although the company had its

own banking account in another bank. The defendant bank did not enquire into the authority of Mr. Underwood to do so nor did the defendant bank make any inquiry whether the company had a banking account of its own or not, and so in the light of these facts the observation in question which is relied on by Mr. Sanyal was made.

63. In the case before me the bank thought that in view of the existing overdraft arrangement in which no definite limit was fixed at any time, the bank was under an obligation to honour the cheque which had actually been put into circulation, for otherwise they might run the risk of being made liable for compensation for damaging the credit of plaintiff 1. Defendant 1 also felt amply secured by reason of the letter of hypothecation or lien and they also felt that further securities would be available if called for. In fact it appears that on 24-7-1946, they called for further securities.

64. So the case before me was not a case of being afraid of merely offending a customer or annoying him but the payment of the cheque was made as defendant 1 was under impression that defendant 1 was under liability or obligation to honor the cheque and refusal to honor it might involve them in an action for damages.

65. Now it must be admitted however that of the various unusual circumstances referred to by Mr. Sanyal the letter of 24-4-1946 does present considerable difficulty in the way of the defendant and it does militate against the case of absence of negligence as set up by

⁴ (1924) 1 KB 775 (793)

the defendant. Further there is no doubt that if too much stress is laid on this letter it is possible to look at the whole case from a completely different angle, but as it is also possible to give a different complexion to the facts of this case inspite of this letter and to come to the conclusion at which I have ultimately arrived, in this case, I have exonerated defendant 1 from the charge of negligence or want of good faith which have been levelled against the bank (defendant 1).

66. Mr. B.C. Mitra wanted to tender in evidence the Clearing House Rules of the banks, in course of the argument, and submitted that the Court can take judicial notice of these Rules as these are matters of common knowledge. The learned counsel For the plaintiffs objected to this on the ground that unless the Rules or the practice were proved by calling somebody from the bank, the Rules could not be tendered in evidence. Mr. B.C. Mitra has drawn my attention to the case reported in '*Alliance Bank of Simla, In re*⁵, ' and to Article 693 of Halsbury's Laws of England, Vol. 13 pages 622-623. But in the case reported in ' AIR 1925 Calcutta 54, the Rules appeared from the affidavits and so the Court took notice of the rules. In the passage cited from Halsbury, it is stated that the Court can take judicial notice about the Hours of banking business. But it does not appear from any decided case or from any authoritative treatise or text book that the Court can take judicial notice of the Clearing House Rules. Mr. Mitra has argued that according to the clearing house rules a banker is under an obligation, to honour a cheque or to refuse to honour it within a few hours and in course of the very clay on which the cheque is presented for encashment, and pursuant to this rule the bank had to make up its mind in course of the short period of time at its disposal and therefore it was not possible For the bank to refer the matter to the drawer of the cheque or consult the drawer who was then in Nepal before making the payment on the cheque. I do not think that it is open to the Court to take judicial notice of the Clearing House Rules, and so this branch of the argument of Mr. Mitra based on the Rules cannot be taken notice of. It however appears from the evidence of Mr. Hodge that he has also spoken

about this rule or practice about the clearing hours in answers to questions 161-162 but his evidence is that the cheque has to be paid within 24 hours. Mr. B.C. Mitra has suggested that the answers have not gone down correctly and the answer should be 2 to 4 hours and not 24 hours. This Court cannot however accept Mr. Mitra's suggestion as there is nothing to show that the answer was recorded incorrectly.

67. It is however clear, as I have pointed out already that at the time the cheque (Ex. D) was presented to defendant 1 (bank) for encashment, the alterations in the cheque were not visible and there were no suspicious circumstances about, the cheque. The drawer of the cheque was in Nepal at the time and there was postal strike going on at the time. So as there was nothing to put the bank on inquiry, I do not think that the bank can be accused of acting negligently in not withholding the payment and consulting the drawee who was in Nepal by correspondence or telegram or otherwise, before making the payment. It may be that the amount of the cheque was a very large amount and this should have put the bank on inquiry, but as I have pointed out already, the bank might have relied on the credit and status of the customer and as they apprehended that they, might damage the credit of the drawer by not paying the cheque, according to the overdraft agreement, they adopted the course that they did in this case.

⁵ AIR 1925 Cal 54(55, 56)

68. Mr. B.C. Mitra also drew my attention to the cases reported in *Penmount Estates. Ltd. v. National Provincial Bank Ltd*⁶. '*Bank of England v. Vagliano Bros*⁷. (3rd para); *Motor Traders Guarantee Corporation Ltd. v. Midland Bank Ltd*⁸., and *Lloyds Bank. Ltd. v. Chartered Bank of India, Australia and China*⁹ for showing the standard of care that is required to be taken by a in paying or collecting cheques, and also For the proposition that the degree of care to be taken in a particular case must depend on and vary according to the particular facts of each case.'

69. The propositions are well settled and it is not necessary therefore to prolong this judgment unnecessarily by dealing with these cases at any length.

70. It appears from the evidence of Mr. Forsyth (Q. 113) that the bank had no knowledge or information before making the payment that the cheque had been stolen or intercepted. Moreover it is not suggested seriously at the hearing or in the argument that the bank had any such, knowledge or information, and I have no doubt that the bank was not aware of the theft or interception or of any fraudulent or material alteration of the cheque before or at the time of making the payment.

71. The signature of the drawer was a genuine one so the mandate was authorised, and the payment having been made in due course, the amount of the extent of the overdraft which was in the nature of a loan granted by the bank (See *Cunliffe Brooks and Co v. Blackburn and District Benefit Building society*¹⁰ and *Cuthbert v. Roberts Lublock and Co*¹¹.; was properly debitible to the plaintiff's account and there can therefore be no question on any wrongful conversion on the part of defendant 1.

72. This disposes of Issues Nos. 2, 3(a), (b), (c), and 4 (a) and 4(b).

73. Issue No. 3(d) :- Now it has been contended by Mr. B.C. Mitra that the plaintiffs having themselves been negligent in sending the cheque by ordinary post from Nepal to Calcutta in an envelope bearing the distinctive stamp of Nepal, and being thus responsible for facilitating the

commission of the fraud, the plaintiffs cannot recover.

74. Reliance is placed on *Scholfield v. Londesborough*¹² and on the well-known case of *London Joint Stock Bank v. Macmillan and Arthur*¹³. In this case of London Joint Stock Bank, it has been held that a customer of a bank owes a duty to the bank, in drawing a cheque, to take reasonable and ordinary precautions against forgery and if as the natural and direct result of the neglect of those precautions the amount of the cheque is increased by forgery, the customer must bear the loss as between himself and the banker. But in this case, a cleric who was entrusted by a firm with the duty of filling up blank cheques and present the same for signature of the partners, had drawn a cheque in which there was no sum in words written on the cheque in the space provided For the writing and there were the figures "2.0.0" in the space intended for figures, and then presented the cheque For the partner's signature. The partner signed the cheque in that form. The clerk subsequently added the words "one hundred and twenty pounds" in the space left for words and

⁶(1945) 173 LT 344 (346)

⁸1937-4 All England Reporter 90(94-96)

⁷1891 AC 107 (117-118, 124-125, 127-128), (1933) A. C. 201 (221) ⁹(1923) 1 KB 40 (59, 73)

¹⁰(1884) 9 A.C. 857, (864-868)

¹²(1896) A.C. 514 (523-524)

¹¹(1909) 2 Ch. 226 (233)

¹³(1918) A.C. 777 (789-790, 814-817, 824-825, 830 and 834)

inserted the figures "1" and "0" respectively on each side of the figure "2" which was so placed as to leave room For the interpolation of the added figures, and then presented the cheque to the bank, and obtained payment of £120/-. It was held that the firm had been guilty of breach of the special duty to take care in the mode of drawing the cheque and the alteration of the cheque was the direct result of that breach of duty and the bank was therefore entitled to debit the firm's account with the full amount of the cheque. The case of '*Young v. Grote*¹⁴', was approved.

75. Mr. B.C. Mitra argued that there was negligence on the part of plaintiff 1 in issuing the cheque and reference was made to Section 73, Bills of Exchange Act, and to Ghalmer's Book (12th Edn.) Page 9.

76. In the case before me there is no question of the cheque being drawn or issued, in a negligent manlier or of any negligence in the mode of drawing being the proximate cause of the forgery being committed. The cheque was properly drawn but it is the mode of transmission of the cheque which is alleged to be responsible for facilitating the interception of the cheque by dishonest persons and enabling them to tamper with the cheque and to commit forgery.

77. In the case of '*Arnold v. Cheque Bank*¹⁵ it has been held that negligence in the custody of a Draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds from person or persons who has or who have wrongfully obtained possession thereof. The negligence in order to estop must be negligence in the transaction itself. The transmission by post, if it is at all any act of negligence, is negligence collateral to the transaction and it could not be regarded as the proximate cause of the forgery.

78. There are many passages in the judgment of Lord Coleridge, C.J, which are well worth quoting but I think it will be more profitable to read the entire judgment from the beginning to the very end '(pages 582 to 590)' as the whole judgment is extremely illuminating and instructive.

79. It may be noted further that this case of '*Arnold v. Cheque Bank* ' is quoted with approval in

'(1918) A.C. 777 (800)(N)', and has been followed by this Court in the case of '*Bam Lal v. Dass Bank Ltd*¹⁶'. This issue is therefore decided against defendant 1.

80. The next question is whether defendant 3 is in any way liable to the plaintiff. Now it is clear from the evidence on record and the facts pleaded in paras 8, 12 and 13 of the plaint that defendant 3 was merely acting as the collecting Banker for its customer, defendant 2.

81. Section 131, Negotiable Instruments Act is as follows :

"A Banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

¹⁴(1827) 4 Bing 253

¹⁶ AIR 1944 Cal 143

¹⁵(1876) 1 C.P.D. 578

Explanation - A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof".

82. The section therefore makes it clear that when a banker receives from its customer a cheque crossed in its favor for collection and received-payment of the amount in its customer's behalf, the fact that the customer's title to the cheque is defective does not render the banker liable to the true owner, (see '*Morison v. London County and Westminster Bank Ltd*¹⁷.',

83. But the section affords protection to the banker if the banker has received payment in good faith and without negligence, otherwise the bank which receives payment on a forged cheque or a cheque to which the customer has no title or only defective title is liable in action for conversion to the true owner, '*Matheissen v. London and County Bank*¹⁸', See also Paget-Banking, 5th Edn. (1947) - pages 229-230' and cases in footnote (g), at page 230). See also '(1924) 1 K.B. 775 .

84. Whether a bank is guilty of negligence depends on the particular facts of each case, (see '*Commrs. of Taxation v. English Scottish and Australian Bank Ltd*¹⁹.', where the bank was held to be negligent; but in the case of '*Bapulal v. Nath Bank Ltd*²⁰.', it was held that the bank was not negligent.

85. The onus of proving "good faith" and "absence of negligence" is on the banker claiming protection under Section 131, Negotiable Instruments Act (1946) Bom 482 (483-184) (AIR. V 33) (U) (paras 2, 3, 4 and 5) of the judgment. (See also - '*Importers Co. Ltd. v. Westminster Bank, Ltd*²¹.',

86. It has been held that the negligences contemplated in Section 82, Bills of Exchange Act 1883 (which is practically similar to Section 131, Indian Negotiable instruments Act) must mean the neglect of such reasonable precautions as ought to be taken with reference to the interest not of the customer who purports to have the authority, but of the principal whose authority he purports to have, the section being framed wholly with reference to the liability of the banker to the true

owner of the cheque and not with reference to the liability of his customer.

87. Now in finding out whether a collecting banker has or has not been negligent in a particular case, it becomes necessary to take into consideration many factors such as the customer, the account and the surrounding circumstances. But no attempt has been made on behalf of defendant 3 to discharge the onus that defendant 3 acted in good faith and without negligence, in collecting the cheque.

88. The cheque was for an unusually large amount. It is not shown by defendant 3 that S. Dass and Co., their customer had a very big account on which they had operated by drawing cheques of very substantial amounts from time to time or that their customer S. Dass and Co. was a customer of long standing and repute or had great personal credit with the bank, so that the mere deposit of a cheque of such, a large amount as Rs.

¹⁷(1914) 3 KB 356

¹⁹ AIR 1920 PC 88

²¹(1927) 2 KB 297 (306)

¹⁸(1879)5 C.P.D. 7

²⁰ AIR 1946 Bom 482

2,34,081/- in the account of S. Dass and Co. with defendant 3 in the circumstances in which the cheque was deposited was not such an unusual thing as would have put the bank on any inquiry. It appears to me that defendant 3 has not discharged the onus which lies on it under Section 131, Negotiable Instruments Act.

89. Mr. N.N. Bose the learned counsel for defendant 3 has referred to the evidence of the plaintiff (Q. 326-331, 332, 355) and has submitted that if the cheque was on the face of it in order and there were no suspicious circumstances appearing on the face of the cheque, there cannot be any question of the collecting banker being put on inquiry or of its acting negligently and hence defendant 3 is entitled to the protection afforded by Section 131, Negotiable Instruments Act.

90. Mr. N.N. Bose has placed reliance on the case of (1879) 5 CPD 7 (15-17), and has submitted that in view of the construction put by Lindley, J. on Section 12, Crossed Cheques Act, 1876 (39 and 40 Vict. Ch. 81) which is similar in language to Section 131, Negotiable Instruments Act, defendant 3 is not liable. Reliance is placed on the following passage of Lindley, J. at page 16-17.

"But when the bank has got the proceeds and the true owner says to the bank 'Hand me those proceeds', the legislature in the second part of the 12th Section says 'No; if you, the bank, have collected only the proceeds of the cheque for your customer, we will not render you responsible For the proceeds when you have dealt, with the cheque in the only way in which, as a matter of business, you could deal with it.

If you have done anything more; if you have applied it to your own use, that is another matter; but if you have simply collected it through, the clearing house in the only way in which a banker collects cheques and that is all you have done, the true owner shall look through you to your customer, and he and not you must be responsible to the true owner For the proceeds."

91. But it is to be noted that at page 16, Lindley, J. observed as follows :

"It is to my mind, a little hard in any case that a banker who merely collects the money for his customer should be liable For the money. I do not mean to say that as the law stood before, the banker was not liable; but it is a little hard; and it appeared to me to be only reasonable, at all events, that the legislature should relieve-bankers from some of the consequences against, which no amount of foresight could possibly guard. When we look at the 12th Section, it is obvious, that that is what is meant."

92. The learned Judges were dealing with, the point of Demurrer on the ground : that the facts admitted in the Statement of Defense showed that the defendants were liable For the conversion of the cheques and for money had and. received and Section 12 of the Statute did not apply to a cheque payable to order, the endorsement to which is forged (page 10).

93. The learned Judges construed the Statute and overruled the point of demurrer. But they did not decide whether the bank in collecting the cheque had acted in good faith and without, negligence. The later cases to which I have referred have laid stress on this aspect of the matter and have held that unless the collecting banker has discharged the initial onus which is on it,, that in collecting the cheque it acted in good faith and without negligence, the banker is not entitled to the protection of the section but is liable for conversion or for money had and received. As I have held that defendant 3 has not discharged the onus, defendant 3 must be held to be liable.

94. It is to be noted however that material paragraphs dealing with the cause of action against defendant 3 were verified as mere submission and they were not verified as statements of facts. Mr. N.N. Bose raised a point of demurrer on this at a late stage of the hearing although in the written statement of defendant 3, the allegations in the plaint were treated as allegations of facts and traversed and dealt with on that basis. The Court upon hearing the parties allowed the plaintiffs leave to amend and accordingly the material paragraphs in the plaint have been reverified.

95. There is also no doubt that on the facts of this case defendant 2, S. Dass and Co., who has not appeared in or defended this suit, is liable for conversion or for money had and received.

96. In the result, the suit as against defendant 1 (Chartered Bank of India, Australia and China) is dismissed but there will be no order as to costs.

97. There will however be a decree in favour of the plaintiffs against defendants 2 and 3 for Rs. 2,34,081/- with interest on decree at 6 per cent. Defendant 3 will pay to the plaintiffs the general costs of the suit and only one day's costs of hearing on scale No. 2. Defendant 2 will pay the costs of the suit on undefended scale. Certified for two counsel.

Order accordingly.