

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13th December, 2013.

+ **RFA 497/2004**

RAJESH GUPTA **Appellant**

Through: Mr. Sugriva Dubey, Advocate.

Versus

CENTRAL BANK OF INDIA **Respondent**

Through: Mr. O.P. Gaggar, Advocate.

AND

RFA 299/2012

RAJESH GUPTA **Appellant**

Through: Mr. Sugriva Dubey, Advocate.

Versus

CENTRAL BANK OF INDIA **Respondent**

Through: Mr. O.P. Gaggar, Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. Both appeals arise from the common judgment and decrees dated 24th May, 2004 of the learned Additional District Judge (ADJ) in Suit No.138/2003 (old Suit No.157/1999) filed by the appellant Mr. Rajesh Gupta and in Suit No.59/2002 (old Suit No.175/2000) filed by the

respondent Central Bank of India. The appellant Mr. Rajesh Gupta had instituted the suit for declaration that he had received the Bank Draft dated 7th April, 1999 for Rs.2,45,000/- drawn by the respondent Bank against a *bona fide* sale effected by him and the amount of the said Bank Draft encashed by him belonged to him. The respondent Bank had filed the suit for recovery of the said sum of Rs.2,45,000/- from the appellant on the ground that the said Bank Draft had been stolen from the Bank in 1998 and its signatures thereon were forged and the payment made to the appellant thereunder in the year 1999 was thus liable to be refunded by the appellant.

2. The learned ADJ vide judgment and decree (*supra*) dismissed the suit filed by the appellant and decreed the suit filed by the respondent Bank for recovery of Rs.2,45,000/- with proportionate costs and future interest @ 12% per annum from the date of decree till realisation.

3. RFA No.497/2004 was filed claiming the relief of setting aside of the judgment and decree “in the suit filed by the appellant”.

4. Even though RFA No.497/2004 sought setting aside only of the judgment and decree “in suit filed by the appellant” which had been dismissed but when RFA No.497/2004 came up first before this Court, while issuing notice thereof, vide *ex-parte* ad interim order dated 15th

September, 2004, subject to the appellant furnishing security to the extent of the decretal amount to the satisfaction of the Registrar of this Court, the operation of the judgment and decree was stayed. In compliance thereof, a Fixed Deposit Receipt (FDR) of Rs.2,68,960/- has been deposited by the appellant in this Court.

5. RFA No.497/2004 came up before this Court for hearing on 24th May, 2012, when the issue, that the same was only against dismissal of suit filed by the appellant and not against the decree against the appellant in the suit filed by the respondent Bank came up and whereafter RFA No.299/2012 impugning the money decree against the appellant came to be filed along with an application for condonation of delay in filing the same. Vide detailed order dated 31st July, 2013, the delay was condoned and hearing of both the RFAs commenced. The respondent Bank was then represented by different Advocates in the two RFAs and during the hearing, a contradictory stand was taken by the two Advocates as noted in the order of that date and on request, the hearing was adjourned to enable the respondent Bank to be represented by one Advocate in both the appeals. Thereafter, the counsels were heard further and judgment was reserved.

6. The appellant, on 1st October, 1999, had instituted the suit claiming the relief of declaration supra, pleading:

- (i) that he is carrying on business of trading in Ropes and Niwar in the name and style of M/s. Rajesh & Co;
- (ii) that on 1st April, 1999, one person namely Shri Suresh Kumar Gupta of Patna approached him with a purchase order for Niwar of 4780 Kg. and 490 gms., worth Rs.2,45,000/-, on credit basis;
- (iii) that the appellant refused to deliver the aforesaid goods on credit basis and demanded the whole payment in cash or by Bank Draft;
- (iv) that the said Shri Suresh Kumar Gupta again approached him on 10th April, 1999 along with a Bank Draft bearing No.016743 dated 7th April, 1999 for Rs.2,45,000/- issued by the respondent Bank and drawn in favour of M/s. Rajesh & Co. and asked for delivery of goods;
- (v) that the appellant still refused to deliver the goods stating that the goods will be delivered after the said Bank Draft gets encashed and to which Shri Suresh Kumar Gupta agreed;

- (vi) that the appellant presented the said Bank Draft to his banker i.e. the Union Bank of India for encashment and which was duly encashed and credited in his account;
- (vii) that after nearly two months therefrom the appellant delivered the goods to the said Shri Suresh Kumar Gupta;
- (viii) that on 17th September, 1999 i.e. after nearly five months from the date of encashment of the Bank Draft aforesaid, the appellant received letter dated 16th September, 1999 from the respondent Bank informing him that the Bank Draft was prepared on stolen/lost Bank Draft leaf and asking him to refund the amount thereof;
- (ix) that even if it was to be believed that the said Bank Draft was prepared on stolen/lost Bank Draft leaf, it was the duty of the respondent Bank, not to encash the same on presentation;
- (x) that the respondent Bank had not issued any notice to the public of the Bank Draft leaves having been stolen/lost and such notice was published only on 21st September, 1999;
- (xi) that the appellant had acted as *bona fide* seller of goods for consideration.

Accordingly, declaration that the appellant was the *bona fide* seller and that the amount of the said Bank Draft belonged to him, was sought.

7. The Union Bank of India being the banker of the appellant and which was defendant No.1 in the suit and which has not been impleaded as party to these appeals, filed a written statement admitting that the appellant had deposited the said Bank Draft in his account with it and the same was sent for clearing to the respondent Bank and after due clearance, credit was transferred to the account of the appellant.

8. The respondent Bank contested the suit, by filing a written statement, on the grounds:

(a) that the appellant was not a holder in due course of the said demand draft;

(b) that in May, 1998, a dacoity had taken place at Maripur Branch in District Muzaffarpur, Bihar of the respondent Bank in which a large amount of cash and 1087 blank demand draft leaves were looted/stolen;

(c) that the subject demand draft was prepared on one of the demand draft leaves stolen in the dacoity;

(d) that the suit was bad for non-joinder of Shri Suresh Kumar Gupta;

(e) denying that the appellant had received and presented the Bank Draft for encashment in good-faith;

(f) that though the respondent Bank takes utmost precaution to ensure that only those cheques presented by persons holding in due course are honoured but at time on account of rush of work and due to oversight, a draft may get encashed to the holder of such a stolen draft.

9. The appellant filed replication to the written statements aforesaid.

10. Thereafter, on 4th September, 2000, the respondent Bank filed the suit for recovery of the amount of the Bank Draft with interest, against the appellant/plaintiff as well as Shri Suresh Kumar Gupta, on the same pleadings as in the written statement aforesaid.

11. Needless to state, the appellant contested the suit of the respondent Bank on the same lines, as the pleadings in the suit for declaration filed by him.

12. Shri Suresh Kumar Gupta was reported to be not available at his address and was proceeded against *ex parte* in the suit filed by the respondent Bank. The said Shri Suresh Kumar Gupta has not been impleaded as party to RFA No.299/2012.

13. Though separate issues were framed in the suits as set out in the judgment of the learned ADJ but else, the suits were consolidated for trial.

14. Though non impleadment of Union Bank of India in RFA No.497/2004 and of Shri Suresh Kumar Gupta in RFA No.299/2012 is a technical defect but since the counsel for the respondent Bank did not urge so and even otherwise, is not found fatal, the appeals have been considered

15. The learned ADJ has in the impugned judgment, found/observed/held:

- (i) that the address of Shri Suresh Kumar Gupta was of Patna; he could not have carried the goods from the shop of the appellant at Delhi by hand; the same ought to have been sent through transport by road or by railway; but surprisingly enough, there is no goods receipt of road transport or railway;

(ii) that the goods which the appellant claims to have sold were not chargeable to sales tax; otherwise, the appellant was supposed to have taken ST form from the purchaser and in which event the existence of the purchaser Shri Suresh Kumar Gupta could have been established through Sales Tax Department;

(iii) that the appellant had kept the Court in complete darkness about the alleged sale;

(iv) that even if the purchaser Shri Suresh Kumar Gupta was not available, the appellant should have examined the persons from the Branch of the respondent Bank which purportedly issued the Bank Draft in question and which would have shown, as to whether the draft was genuinely issued by the said Branch; the appellant deliberately chose not to adduce the said evidence;

(v) that the appellant was thus not the holder in due course of the said Bank Draft;

(vi) that Shri Suresh Kumar Gupta, though not a necessary party to the suit filed by the appellant, was a necessary witness;

(vii) that since the appellant had admittedly received the amount of the demand draft in question, the suit for recovery of that amount could be filed against him only;

(viii) that though the respondent Bank had neither warned its other Branches not to encash the demand draft against the stolen leaves nor immediately given any public notice to warn the members of the public at large but all the said facts were irrelevant, since the appellant was not the holder in due course of the demand draft.

Accordingly, the suit of the appellant for declaration was dismissed and the suit of the respondent Bank for recovery of Rs.2,45,000/- being the amount of demand draft with interest, was decreed.

16. It was enquired from the counsel for the respondent Bank during the hearing on 31st July, 2013, whether it was the case of the respondent Bank that the appellant is in conspiracy with the person/s who had stolen/robbed the leaves of the said Bank Draft from the respondent Bank and had the respondent Bank complained against the appellant.

17. The answer was in the negative.

18. It was the contention of the counsel appearing for the respondent Bank in RFA No.497/2004 on 31st July, 2013 that the subject Bank Draft having been issued by the respondent Bank without consideration, under Section 43 of the Negotiable Instruments Act, 1881, the respondent Bank was not liable thereunder and the claim of the appellant could only be against Shri Suresh Kumar Gupta. Per contra, the counsel appearing for the respondent Bank in RFA No.299/2012 on 31st July, 2013 contended that since the subject Bank Draft was account payee in favour of the appellant only and negotiation thereof had been scored off, the subject Bank Draft was not a negotiable instrument. It was further the contention of the counsel for the respondent Bank during the hearing on 6th August, 2013 that though a Bank Draft is a negotiable instrument but upon being engrossed as 'Account Payee Only', loses its negotiability. On specific query put to him, whether, without being a Negotiable Instrument, the concept of holder in due course, on which the learned ADJ has decided against the appellant, will apply, it was argued that the claim of the respondent Bank against the appellant was on the principle of restitution enshrined in Section 72 of the Indian Contract Act, 1872 and the respondent Bank is entitled to refund of the amount mistakenly paid under the said Bank Draft to the appellant.

19. On further enquiry from the counsel for the respondent Bank, as to why the respondent Bank could not have stopped the payment under the Bank Drafts, leaves whereof had been stolen/robbed, he stated that it is not possible for the respondent Bank to stop payment thereof, as it was not for the respondent Bank to know in which Branch of the Bank, the draft would be presented for encashment. Reliance was placed on *R.E. Jones, Ltd. Vs. Waring & Gillow Ltd.* (1926) All E.R. Rep. 36 and *State Bank of India Vs. Punjab National Bank* 57 (1995) DLT 55 and Section 85A and Sections 123 to 131A of the Negotiable Instrument Act.

20. The contention of the counsel for the appellant, was of negligence on the part of the respondent Bank.

21. As would be apparent from the aforesaid, the sole point on which the learned ADJ has decided in favour of the respondent Bank i.e. of the appellant being not entitled to retain the money already received by him under the Bank Draft, for the reason of not being the holder in due course of the said Bank Draft, is not supported by the counsel for the respondent Bank before this Court.

22. Section 72, contained in Chapter V of the Contract Act titled “Of Certain Relations Resembling Those Created By Contract” on which the

counsel for respondent Bank pegged his argument, provides that a person to whom money has been paid or anything delivered by mistake or under coercion, must repay or return it. The respondent Bank, neither in its written statement to the suit filed by the appellant nor in the plaint in its own suit, is found to have pleaded any mistake. Order VI Rule 4 of the Civil Procedure Code (CPC), 1908, requires a party to a litigation relying on any misrepresentation, fraud, breach of trust, willful default or undue influence, to plead particulars with dates and items, if necessary. The said provision, in my opinion, would be applicable to a plea of mistake also. Not only has mistake not been pleaded but no particulars whatsoever of the precautions, if any taken by the respondent Bank against encashment of drafts prepared on stolen draft leaves or the name of the person in the respondent Bank who committed the mistake, have been pleaded. Rather, the claim of the respondent Bank against the appellant/plaintiff was on the ground of the appellant not being the holder in due course of the Bank Draft and thus being not entitled to retain the monies thereunder.

23. In my opinion, the appellant has proved receipt of the subject Bank Draft towards sale consideration. Neither was it the plea of the respondent Bank that the subject Bank Draft has been received by the appellant

otherwise nor has the counsel for the respondent Bank, neither in cross-examination of the appellant nor in arguments been able to suggest any irregularity in sale or the sale being fictitious. As far as the doubts attributed in the impugned judgment to 'the sale' are concerned, I am unable to agree. It cannot be lost sight of that Bank Drafts are akin to cash. A seller of goods may take precautions as of satisfying itself of the identity and credentials of buyer while selling/supplying goods on credit or against cheque yet to be encashed but a seller of goods who has already received payment thereof by Bank Draft, as the appellant had, is not required to observe any such caution and cannot be blamed for not having any proof of identity of the buyer. It is not as if, voluminous goods would always be consigned/forwarded to the purchaser through railway or road transport. Cases of purchasers from other States personally visiting the wholesale markets of Delhi and making purchases and taking personal delivery of voluminous quantities against cash are not unheard of; such buyers often have their own transporters in the same market or also carry the goods with them in train or by road. Thus, the sale cannot be said to be suspect for said reason.

24. Similarly, the reasoning given in the impugned judgment, of the appellant having not examined Sh. Suresh Kumar Gupta, is found to be erroneous. The appellant as aforesaid was not required to have proof of his identity or credentials. Further, report on summons sent to him, having already been received of his being not available at the address, no adverse inference even can be drawn against the appellant. There was no need also for the appellant to prove the Bank Draft to be genuine as the case of the appellant was/is that since the respondent Bank had made payment thereunder, the appellant was not liable to refund the same.

25. Even though the respondent Bank has not pleaded or built a case of being entitled to the money on the principle enshrined in Section 72 supra of mistake, but even if the matter is to be considered in the said perspective, I fail to see as to how the respondent Bank can succeed on that ground as well.

26. At the outset, it is necessary to clarify that Section 72 of the Contract Act is not absolute and does not demand that every payment made by a party while laboring under a mistake of fact is to be mechanically directed to be recovered. As far back as in *Shiba Prasad Singh Vs. Maharaja Srish Chandra Nandi* AIR 1949 PC 297, it was held that the provision does not

imply that every sum paid under mistake is recoverable, no matter what the circumstances may be and that there may in a particular case be circumstances, which disentitle a plaintiff to such relief by estoppel or otherwise. In the same vein have been the observations of the Constitution Bench of the Supreme Court in *Mafatlal Industries Ltd Vs. Union of India* (1997) 5 SCC 536, wherein it was stated that Section 72 is a rule of equity and it is not correct to say that equitable considerations have no place where a claim is made under the said provision. It was further held that such equitable considerations are not a matter of law but depend upon the facts of each case.

27. One of such equitable defenses to a claim for restitution based on mistake, as observed in *Shiba Prasad Singh* supra, is of estoppel. In the facts of the present case, as aforesaid, it stands proved that the respondent Bank by honouring the Bank Draft and crediting the amount thereof to the banker of the appellant which in turn credited that amount to the account of the appellant, caused/permitted the appellant to deliver the goods of the value of the Bank Draft to Shri Suresh Kumar Gupta. Section 115 of the Indian Evidence Act, 1872, enshrining the principle of estoppel, does not allow the respondent Bank to subsequently plead that it has not issued the

Bank Draft which it has already honoured. Thus, the respondent Bank would be disentitled/estopped from recovering the money from the appellant, even if were to plead/prove payment by mistake.

28. I must however mention that in cases of cheques of its customers honoured by the banks and which were subsequently found to have not been issued by the customers and having forged signatures of the customers, though earlier the defense of estoppel was held to be available against a claim of the bank for recovery of the amount paid under such cheque (see *Price Vs. Neal* (1762) 3 Burr. 1355 and *Smith Vs. Mercer* (1815) 6 Taunt. 76) but in *National Westminster Bank Vs. Barclays Bank International Ltd.* [1975] Q.B. 654 it was held that a paying bank owes no duty of care to a payee and merely by honoring an undetectably forged instrument, a bank does not represent that the instrument was genuine, and therefore no estoppel by representation or negligence can be raised against it.

29. Our Supreme Court, in *Canara Bank Vs. Canara Sales Corporation* (1987) 2 SCC 666, in the context of relationship between a banker and a customer, has held that when a cheque signed by a customer is presented before a bank with whom he has an account, there is a mandate on the bank to pay the amount covered by the cheque; however, if the signature on the

cheque is not genuine, there is no mandate on the bank to pay and the bank, when it makes the payment on such a cheque, cannot resist the claim of the customer with the defence of negligence on his part such as leaving the cheque book carelessly so that third parties would easily get hold of it. The reason for holding so was explained by stating that a document in cheque form, on which the customer's name as drawer is forged, is a mere nullity. A discussion on this aspect is also to be found in *UCO Bank Vs. D. Nath & Co.* MANU/DE/0162/2011 and *Steel Authority of India Vs. Punjab & Sind Bank* MANU/DE/6261/2012.

30. *State Bank of India* supra relied upon by the counsel for the respondent Bank is also a case of payment by the State Bank of India to another bank namely Punjab National Bank on a cheque drawn by the Land Acquisition Collector and which was subsequently discovered to be bearing the forged signatures of the Land Acquisition Collector. Section 72 of the Contract Act was invoked by the State Bank of India. Punjab National Bank raised a plea of estoppel. A Single Judge of this Court relying on *National Westminster Bank* supra held the plea of estoppel to be not available against the State Bank of India. In addition, support was drawn from *Sales Tax Officer Vs. Kanhaiya Lal Mukundlal Saraf* AIR 1959 SC 135 holding

that if it has been established that payment has been made under mistake, the party receiving, is bound to return it and no question of estoppel can arise where both parties are laboring under mistake and one party is not more to blame than the other; and that there can be no estoppel in regard to position of law.

31. However *Kanhaiya Lal Mukundlal Saraf* supra was dissented from by the Constitution Bench of the Supreme Court in *Mafatlal Industries Ltd* (at page 612) supra. It was held that there was inconsistency in *Kanhaiya Lal Mukundlal Saraf* in, on the one hand observing that Section 72 of the Contract Act is subject to question of estoppel, waiver, limitation or the like and on the other hand, holding that equitable considerations cannot be imported because of the clear and unambiguous language of Section 72. The Constitution Bench as aforesaid held that equitable considerations cannot be held to be irrelevant where a claim for refund is made under Section 72.

32. At the same time, it may be noticed that both *Kanhaiya Lal Mukundlal Saraf* and *Mafatlal Industries Ltd* were not cases relating to banks.

33. A Division Bench of the Calcutta High Court in *United Bank of India Vs. A.T. Ali Hussain & Co.* AIR 1978 Cal 169 was also concerned

with the claim of a bank for realization of money paid on a cheque drawn by the customer and which was subsequently discovered to be not bearing the signature of the customer, on the basis of a mistake. The defendant therein took the defense of estoppel. The judgments of the English Courts holding the defense of estoppel to be not available against a bank were held to be not applicable to India for the reason of claim under Section 72 of the Contract Act having been held in *Shiba Prasad Singh* supra to be subject to the defense of estoppel or otherwise.

34. Though the dicta of Supreme Court in *Canara Bank* supra superficially appears to take a different view from that of the Division bench of the Calcutta High Court but that was a case by a customer against its bank for recovery of the amount paid by the bank from the customer's account on the basis of forged cheques. In those facts, it was held that a forged cheque carries no mandate to pay. The same was the factual context in *D. Nath & Co.* supra. *Steel Authority of India* supra pertained to a forged Letter of Credit.

35. The factual context in the present case is of a different genre. Here the forgery is not of the signatures of the customer of the bank but of the bank itself. The respondent Bank was very well aware about one year prior to the

date of making payment under the subject Bank Draft that the Bank Draft leaf of that number had been stolen/robbed from it. Nothing prevented it from stopping payment under such stolen/robbed Bank Draft leaves, even if the same were to be presented for payment. The plea that the bank could not know at which branch the said drafts would be presented for encashment is an eyewash. Instructions of stop payment ought to / could have been given to all the branches. The incident is not archaic but of the year 1999-2000 by when modes of communication and computerization were at an advanced stage. No preventive steps at all are pleaded to have been taken in this regard.

36. On the other hand is the appellant, who owing to such inaction of the respondent Bank has proved to have changed his position to his detriment.

37. I see no reason why the defense of estoppel can be said to be not available to the appellant in these facts, to the claim of the respondent Bank on the plea of mistake. I have not come across any judgment of the Indian Courts holding such a plea to be not available against a bank. Rather in *Canara Bank* supra, the plea of estoppel by negligence of the customer was held to be not available to a bank against its customer. Of course, the Single Judge of this Court in *State Bank of India* supra held the plea of estoppel to

be not available against a bank, basing his view on the English judgments and *Kanhaiya Lal Mukundlal Saraf* supra, but since *Kanhaiya Lal Mukundlal Saraf* is no longer good law, I do not consider myself bound by the judgment of the Single Judge of this Court in *State Bank of India* supra.

38. There is another view of the matter. The House of Lords in *Lipkin Gorman Vs. Karpnale Ltd.* [1992] 4 All ER 512, held that independently of the defense of estoppel, the defense of ‘change of position’ is available against a claim on the basis of a mistake. It was held that this defense is available to a person whose position has so changed that it would be inequitable to require him to make restitution. It was further held that the defense of ‘change of position’ is wider than the defense of estoppel because it does not depend on any representation or breach of duty by the person making the payment under mistake; it is predicated on the premise that where an innocent defendant’s position is so changed that he will suffer injustice if called upon to repay, the injustice of requiring him to pay outweighs the injustice of denying the plaintiff restitution. This was however again not a case involving a bank.

39. However common law implied and permitted such a defense in cases where there was no timely communication of the notice of dishonor of the

instrument under which payment was mistakenly made by the bank to the payee. This rule known as the ‘Cocks Vs. Masterman Rule’ (see *Cocks Vs. Masterman* (1829) 9 B & C 902) was subsequently elaborated in *London & River Plate Bank Vs. Bank of Liverpool* [1896] 1 QB 7 and was based on the premise that the holder ought to know at once whether the instrument which is presented for payment is going to be paid or not and if there is an interval of time in which the position of the holder may get altered, the money so paid upon the instrument cannot be recovered back. Although the amplitude of this rule has been curbed by subsequent decisions of English Courts (see *Imperial Bank of Canada Vs. Bank of Hamilton* [1903] AC 49 and *National Westminster Bank* supra), but the salutary rule, which still survives, even in its constricted form, is found to be squarely applicable to the facts of the present case. The Division Bench of the Bombay HC in *Raghunath Rithkaran Vs. The Imperial Bank of India* AIR 1926 Bom 66 though noticing *Imperial Bank of Canada* supra nevertheless applied the ‘Cocks Vs. Masterman Rule’.

40. The defense of ‘change of position’, so prevailing in English Law, is found to have been alluded to by the Constitution Bench in *Mafatlal Industries Ltd* supra and recognized in Pollock and Mulla, Indian Contract

and Specific Relief Acts, 12th Edition at page 1447. The same was also applied by the Division Bench of the Calcutta High Court also in *A.T. Ali Hussain & Co.* supra. Thus, howsoever incongruous it may appear that though the defense of estoppel has been held to be not available against a bank but the defense of ‘change of position’ which is nothing else but a narrower facet of the principle of estoppel has been held to be available against a bank, but in the absence of any dicta of the Indian Courts holding such defenses to be not available against bank, I am inclined to invoke the said defenses against the claim of the respondent Bank on the basis of mistake. I may also notice that Chitty on Contracts, 28th Edition at paragraph 30-114 has opined that mistake, as the ground of recovery is wide and it is important to accept a broad defense. It is further observed that if the basis of the claim is unjust enrichment of the defendant, any available defenses should be similarly be based on the extent of any enrichment and should apply where the enrichment has been erased.

41. In such a situation, in my view, the party which is found to be more at fault has to bear the burden of the loss. In the present case, the respondent Bank is found to be more at fault, though both, the appellant and the respondent Bank, are found to have suffered a loss. The time honoured rule

of equity formulated in *Lickbarrow v. Mason* (1787) 102 E.R. 1192 and recognized by the Supreme Court in *The New Marine Coal Co. (Bengal) Private Ltd. Vs. Union of India* AIR 1964 SC 152 and *Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co.* AIR 1966 SC 543 runs as follows:

“Whenever one of two innocent parties must suffer by the act of third, he who has enabled such person to occasion the loss must sustain it.”

It is evident that the claim of the respondent Bank for recovery of moneys paid under mistake must fail on this count alone.

42. Though the counsel for the respondent Bank has not supported the reason on which the impugned judgment upheld the claim of the respondent Bank i.e. of the appellant being not a holder in due course but since queries as aforesaid were raised during the hearing, it is deemed appropriate to deal therewith also.

43. A pay order, in *Punjab & Sind Bank Vs. Vinkar Sahakari Bank Ltd.* (2001) 7 SCC 721 was held to be a negotiable instrument under the Negotiable Instruments Act. Crossing of an instrument as ‘account payee’ has been held to have no effect on its negotiability in *Durga Shah Mohan Lal Bankers Vs. Governor General In Council* AIR 1952 All 590 and

Tailors Priya Vs. Gulabchand Danraj AIR 1963 Cal 36. The same view has been taken in Tannan's Banking Law and Practice in India, 19th Edition, at page 284.

44. As far as the question, whether the appellant could be said to be 'holder in due course' of the said Bank Draft / pay order, the Supreme Court in ***U. Ponnappa Moothan Sons Vs. Catholic Syrian Bank Ltd.*** (1991) 1 SCC 113 has categorically held that mere failure to prove *bona fides* or negligence does not negative a claim of a person being a 'holder in due course' and it is for the Court to decide, in a given case, whether negligence on the part of the holder is so gross and extraordinary so as to presume that he had sufficient cause to believe that the title conveyed to him was defective.

45. The learned ADJ has not returned such a finding of negligence on the appellant of such degree and scale that law could impute notice of defect of title of the purchaser on the appellant. In the absence of such a finding, the appellant could not have been held to be not a 'holder in due course'.

46. Resultantly, the appeals are allowed; the judgment and decree of the learned ADJ in both the suits, is set aside. The suit filed by the appellant is decreed with costs and the suit filed by the respondent Bank is dismissed.

47. Stay of execution as aforesaid, was granted subject to the appellant furnishing security by way of FDR in this Court. Since the appeals have been allowed, the said security is discharged and the FDR deposited by the appellant in this Court, be released and returned back to the appellant.

48. Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

DECEMBER 13, 2013

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