

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 11.8.2017
Pronounced on: 23.08.2017

Coram

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

Second Appeal No.1295 of 1999

Mrs.Rosali .. Appellant/Plaintiff
/versus/
M/s Syndicate Bank,
Luz, Mylapore, Madras-4 .. Respondent/Defendant
represented by its Manager

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.129 of 1997 dated 29.04.1998 on the file of the II Additional Judge, City Civil Court, Madras reversing the judgment and decree dated 30.08.1996 in O.S.No.535 of 1988 on the file of the II Assistant Judge, City Civil Court, Madras.

For Appellant : Mr.R.Thiagarajan
For Respondent : Mr.V.Bhiman for
M/s Sampathkumar Associates

J U D G M E N T

The appellant herein is the plaintiff. The suit filed for recovery of money with interest.

2. The case of the plaintiff is that she opened a Saving Bank Account with the defendant Bank in the year 1983 under Account No.5623/14. Every month, she used to deposit her rental income Rs.750 to Rs.800/- in the said account. On 01.07.1985, she withdrew a sum of Rs.1500/- under a cheque bearing No.332771 and on 03.11.1986, she withdrew a sum of Rs.10,000/- under a cheque bearing No.332772. Except these two withdrawals, she has not withdrawn any money during that period. Her balance as on May 1987 ought to have been a sum of Rs.52,900.55. But, to her shock and surprise, when she verified with the bank, she found that she had only balance of Rs.127.55 and one Mr.Thomas, who is her messenger and relative used to transact with the Bank on her behalf, has forged her signatures in the cheque slips and withdrawn a total sum of Rs.52,900.55, without her knowledge.

3. The Bank Officials, who should have shown proper care, while passing cheques containing forged signatures, has failed to do so, resulting in withdrawal of Rs.52,900.55 by the said Thomas fraudulently. The defendant Bank Officials had passed the cheques without due care and by gross negligence, which

amounts to dereliction of duty and misconduct in the course of employment. Had due diligence shown by the Bank Officials by proper comparison of the specimen signatures of the plaintiff kept in the custody of the Bank with, the cheques presented by the said Thomas ought not have passed the forged cheques.

4. Based on her complaint to the Mylapore Police Station against the said Thomas, the Police has registered a case and the Trial ended in conviction for two years of Rigorous Imprisonment. Since the defendant Bank has negligently passed the cheques containing four signatures, they are liable to pay a sum of Rs.52,900.55 with interest at the rate of 18%.

5. The defendant resisted the suit claim on the ground that the plaintiff introduced one Thomas as a close relative of her husband and informed the Bank that he will be helping her in interacting with the Bank. The said Thomas was operating the account on her behalf by depositing the money and collecting cash through bearer cheques. The cheques were honoured only, after due verification with the signatures and there was no variations to entertain any suspicion over those cheques. Further, the said Thomas himself was an account holder and he was introduced by the plaintiff for opening the account. The plaintiff ought to have verified her account periodically and also ought to have kept the cheque book as well as pass book in her safe custody so as to prevent any misuse by others. Having allowed the said Thomas to handle her cheque book and pass book, the plaintiff cannot blame the Bank Officials for honouring the bearer cheques bearing signatures of the plaintiff and presented by the said Thomas. Since there is no negligence on the part of the defendant, the plaintiff is not entitled for any relief.

6. The trial Court framed the following issues:-

1. Whether the plaintiff is entitled for the amount claimed?

2. What other relief the plaintiff is entitled to?

7. In support of her case, the plaintiff was examined herself as PW1 and marked 10 exhibits. On behalf of the defendant, 8 witnesses were examined and 70 documents were marked.

8. The trial Court, after considering the evidence let in by the parties, has allowed the suit holding that the negligence on the part of the defendant for not periodically verifying the account cannot be a reason to justify the defendant's Bank honouring forged cheques.

9. On appeal by the defendant's Bank, the lower appellate Court on re-appreciating the evidence, has held that the plaintiff has not proved her case of negligence on the part of

the defendant's Bank and when there is no evidence to prove the signatures found in the cheques honoured by the Bank are forged signatures, no liability can be mulcted on the defendant. Faulted the trial Court judgment that without any scientific proof of forgery, mere by comparison of signatures through naked eye, the trial Court has wrongly held that the signatures found in the disputed cheques are forged. The lower appellate Court reversed the finding of the trial Court and dismissed the suit pointing out that without subjecting the disputed cheques for scientific comparison with the admitted signature, the trial Court has presumed forgery and negligence based on criminal Court judgment.

10. Aggrieved by the reversal judgment, the present second appeal is filed on the following substantial questions of law:-

1. Whether the respondent acted negligently thereby disentitled from claiming protection under Section 131 of Negotiable Instrument Act?

2. Whether the respondent is absolved from its liability in the absence of any valid mandate by account holder to pay the value of the impugned cheque?

3. Whether the bank is absolved by pleading that the customer was negligent in leaving the cheque carelessly? If the cheque has not been signed by the customer with the intention to issue mandate when the payment was made by the respondent/bank is valid in the eye of law?

4. Whether the disputed signatures appear to be forged?

5. Whether the learned Judge is prohibited from comparing the signature by himself as has been enunciated in A.I.R.1994 Karnataka page 315?

6. Whether the respondent-bank has exercised due care and caution?

11. The sum and substance of the plaintiff claim is that, she entrusted the cheque book and pass book to one Thomas, who is a known person and close relative of her husband and she left Chennai to Krishnagiri to join her husband. In her absence, the said Thomas was handling the bank accounts. While so, he has misused the cheque leaves by forging her signatures and withdrawn the money through 54 cheques. Her contention is that, there is negligence on the part of the Bank in honouring those cheques presented by Thomas with her

forged signatures. She relies upon the conviction of the criminal Court slapped on Thomas, based on the complaint given by her. While the trial Court has relied upon the judgment rendered in the criminal prosecution, the lower appellate Court has rightly pointed out that the judgment in the criminal case is not a conclusive proof for the civil suit. The plaintiff ought to have independently proved her case of forgery by letting the evidence. It is also to be pointed out that, while the First Information Report-Ex.A4 is in respect of fraud committed by Thomas to the tune of Rs.49,000/-. The judgment of the criminal Court is only in respect of two cheques that too, based on the guilty pleaded by the accused. The records reveal that the plaintiff has made an attempt to compare the signatures found in the cheques marked as Ex.B3 to Ex.B56. But no report of handwriting expert is marked.

12. Further, learned counsel appearing for the appellant/plaintiff submitted that his endeavour to compare the signatures found in the forged cheques with that of the signatures of Thomas could not fructify because Thomas died, pending the suit. This Court fails to understand why the plaintiff made an attempt to compare the signatures found in the cheques with that of Thomas? When Thomas is not a party to the suit and the plaintiff's specific case is that the signatures found in the cheques are not her signatures but, forged by Thomas. In all prudence, she should have established her case by subjecting herself for comparison of her admitted signatures with that of the signatures found in the cheques. In civil cases for recovery of money, the person who pleads forgery, it is sufficient to prove the signatures found in the cheques, are not her signatures. Unlike the criminal case where it is required to prove positively that the signatures found in the cheques are that of the forgerer.

13. The learned counsel appearing for the appellant/plaintiff for enlightenment of this Court, circulated the commentaries on Law of Banking by Paget's 2015 Edition, Lexus Nexus Publication. It is a well researched Master Piece on Law of Banking in which, the Chapter relates to payment against a forged cheque or unauthorised signature lists out the effect of honouring forged cheque. Along with the relevant commentary on the duty of the customer; extract of two foreign judgments also reduced for proper understanding of law on this point.

(I) THE CUSTOMER'S DUTY TO REFRAIN FROM FACILITATING FRAUD OR FORGERY:

23.7. The customer owes his bank a duty to refrain from drawing cheques or other payment orders in such a manner as to facilitate fraud or forgery. This is often referred to as the Macmillan duty, following the House of Lords' decision in London Joint

Stock Bank Ltd. V. Macmillan.[London Joint
Stock Bank V. Macmillan [1918] AC 777, HL]

The facts in the Macmillan case were that the customers, Macmillan and Arthur, had a clerk who prepared and presented for signature to one of the partners cheques for small amounts of petty cash. The clerk, with a view to fraud, wrote a cheque, inserting a '2' in the space for figures, with available blanks before and after the numeral, putting nothing where the sum in writing should appear. The cheque was to bearer and uncrossed. He then handed the cheque to a partner who was just leaving the office and who, being in a hurry, failed to notice anything unusual. Being told it was for petty cash and that 2 pounds would be sufficient, the partner signed it. The clerk filled in 'One hundred and twenty pounds' in writing, inserted a '1' before the '2' and a '0' after it, presented it to the bank; he received the £120 and absconded. The judge at the trial and the Court of Appeal decided against the bank; the House of Lords reversed this decision and gave judgment for the bank. Lord Finlay defined and explained the customer's duty as follows.[Greenwood v. Martins Bank Ltd. [1933] AC 51].

"If he (the customer) draws a cheque in a manner which facilitates fraud he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty.... As the customer and the banker are under a contractual relation in this matter, it is obvious that, in drawing a cheque, the customer is bound to take usual and reasonable precautions to prevent forgery. Crime is, indeed, a very serious matter, but everyone knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description."

14. Yet another defence available for the Bank is that, customer is estopped from asserting the forgery by the reason that the payment order was genuine. In Brown v. Westminster Bank Limited [1964] 2 Lloyd's Rep.187, the claimant expressly stated to the bank manager that certain cheques were genuine. The submission that there could be no estoppel in regard to

the cheques paid before the representation was rejected, and it was held that the customer was debarred from 'setting up the true facts in relation to the cheques which had already been forged'. The estoppel will therefore apply to the cheques already paid by the paying bank and to subsequent cheques drawn in the same manner.

15. The evidence, as appreciated by the lower appellate Court, reveals that the plaintiff has given authorization letter to Thomas for collecting cheque book and pass book on her behalf. She has entrusted Thomas for operating the account in her name. She accepts two cheques signed by her and money was withdrawn through Thomas. She admits that she misplaced her cheque book and pass book and did not update her account for long time.

16. It is contended by the learned counsel for the appellant that the finding of the trial Court based on comparing the signatures though naked eye cannot be faulted in view of explicit power given to Court under Section 73 of the Indian Evidence Act, 1872. On reading of the trial Court judgment, this Court finds that the trial Court has not spelt out, which are the admitted signatures of the plaintiff, were compared with disputed signatures found in the cheques or the manner in which he compared and how he got satisfied that the signatures found on the cheques are forged.

17. The judgments of this Court in (i) Central Bank of India (A Nationalized Bank) rep.by its Manager v. Antony Hardware Mart, rep.by its Proprietor K.Subbiah and another reported in [2006 (3) CTC 39]; and (ii) S.Murugesan v. V.Vijay Sai and others reported in [2006(5)CTC 560];

18. It is held that the Court is competent to compare the disputed signature with the admitted signature and come to an independent conclusion, notwithstanding the availability and non-availability of expert opinion, but, while exercising that right, the Court should show utmost diligent and caution.

19. In addition, Section 131 of Negotiable Instrument Act 1881, indicates the circumstances when the bankers are not liable for honouring cheques. The said Section reads as below:

131. Non-liability of banker receiving payment of cheque:-

"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 and liability to the true owner of the cheque by reason only of having received such payment.

Explanation I- A banker receives payments 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."

20. A plain reading of this Section and Explanation appended to this Section brought in by way of Negotiable Instruments (Amendment) Act 1922, clearly indicate that, the Banker shall not be held liable to the true owner for receiving payment of a cheque crossed generally or specially in good-faith and without negligence in case the title of the cheque proves defective. Section 131 protects a banker who in good-faith and without negligence receives payment for a customer of a crossed cheque when the title to the cheque proves defective.

21. To seek protection under this section, the Banker has to establish that it was not negligent while honouring the cheques presented by Thomas and it was acting in good faith, after following standard protocol for passing the cheques. In this case, the depositions of P.W.1 to P.W.6 satisfy the said requirements. To prove that there was negligent on the part of the bank, it is for the plaintiff to adduce the evidence satisfactory to the conscious of the Court. While the trial Court has cursorily gone through the evidence and allowed the suit, the lower appellate Court has pointed the lapses and lacunae in the finding of the trial Court and has reversed the finding of the trial Court.

22. This Court, on going through the materials placed, holds that the respondent bank was never negligent in honouring the cheques. Hence, they are protected under Section 131 of the Negotiable Instrument Act, 1881. In the absence of justification on the part of the plaintiff for allowing the said Thomas to handle her passbook and cheque book and representing to the bank implicitly and explicitly that Thomas is her representative, she is estopped from alleging negligence on the part of the respondent bank. Therefore, the conduct of the respondent Bank estops her from questioning the bank for honoring the cheques of the plaintiff. Even if it is not signed by her, but due to lookalike signatures, the bank cannot be held responsible. The evidence of DW1 to DW6 narrate the care and caution exercised by the bank officials while passing the cheques. Therefore, their evidence cannot be just ignored, in the absence of contra evidence. As pointed out by the lower appellate Court, the reasoning of the trial Court is bad and bereft of details for his conclusion that the signatures found in the cheques are forged. Therefore, even though there is no legal impediment to exercise the power under Section 73 of the Indian Evidence Act, 1872, without resorting to expert opinion under Section 45 of the Indian Evidence Act, 1872, the manner

in which the power under Section 73 of the Indian Evidence Act, 1872 exercised is always subject to judicial scrutiny. First and foremost, the plaintiff/appellant ought to have proved the case of forgery by letting in plausible evidence, which is well within her limitation, but miserably failed to do.

23. Next, in the absence of reasoning and the process undertaken by the trial Court to arrive at the conclusion that signatures found in the disputed signatures are forged, since finding deserves to be reversed. The lower appellate Court has rightly reversed the trial Court finding by allowing the first appeal.

24. Hence, there is no ground need to interfere with the lower appellate Court judgment. Accordingly, the Substantial Questions of Law are answered.

25. For the above said reasons, this Court finds no merits in the Second Appeal. Hence, the Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

- 1.The II Additional Judge, City Civil Court, Madras
- 2.The II Assistant Judge, City Civil Court, Madras.

Copy to:

The Section Officer, VR Section,
High Court, Madras.

+ 1 cc to M/s. Sampathkumar, Advocate SR.60783

S.A.No.1295 of 1999

SSI (CO)
EU(28/10/2017)