

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.586 of 2000

Mrs.Rosali

.. Appellant/Plaintiff

/versus/

Canara Bank, Mylapore
Branch, Royapettah High Road,
Chennai-4.

.. Respondent/Defendant

Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree passed in A.S.No.120 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.536 of 1988 on the file of the II Assistant Judge, City Civil Court, Madras.

For Appellant :Mr.R.Thiagarajan

For Respondent :Mr.Balachandran

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 in the year 1979, she opened a Saving Bank Account bearing No.12978 at Canara Bank, Mylapore Branch and transacting with the defendant bank through her messenger-cum-relative by name Thomas. During the month of May, 1987, the credit balance should have been Rs.30,787.12. However, she found that there was only Rs.6370.12 as on 29.06.1987 and the defendant bank has honoured cheques presented by Thomas forging her signatures. Totally a sum of Rs.24,750/- has been withdrawn by the said Thomas using her cheques and affixing her signatures fraudulently. She gave a complaint to the Police, which ended in conviction of Thomas. Since the defendant bank has negligently honoured cheques presented by Thomas by forging her signatures, they are liable to pay a sum of Rs.24,750/- with interest at the rate of 18%.

3. The defendant Bank contested the suit through their counter on the ground that the plaintiff used to come along with Thomas to the Bank while operating her account and some time she used to send Thomas with cheque and passbook for withdrawal. Each and every time, when cheques were presented by Thomas, the signatures were verified and passed, after due diligent. Since the plaintiff allowed her relative-cum-messenger Thomas to operate her account on her behalf, there was no occasion to suspect Thomas. Further, the signatures in the cheques had tallied with the specimen signatures kept in the record of the bank. Hence, there was no negligence on the part of the Bank. Since the plaintiff has failed to keep the passbook and cheque book in under safe custody, but allowed her messenger Thomas to handle her accounts and cheques, she cannot blame the bank for the fraud committed by her representative.

4. The trial Court based on the pleadings framed the following two issues and one additional issue:

1. Whether the plaintiff is entitled for the relief sought for?

2. What other relief the plaintiff is entitled to?

Additional Issue:-

1. Whether the defendant bank was negligent while honouring cheques?

5. To prove her case, the plaintiff has examined herself as PW1 and marked 8 documents. On behalf of the defendant, 6 witnesses were examined and 62 exhibits were marked. Also, court documents Exs.C1 to C5 were marked during the examination of PW1.

6. The trial Court, after considering the evidence let in by the parties, has allowed the suit.

7. On appeal by the defendant 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 Bank and when there is no evidence to prove the signatures found in the cheques honoured by the defendant Bank are forged signatures, no liability can be mulcted on the defendant bank. 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.

8. 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 dis-entitled 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?

9. The sum and substance of the plaintiff case is that since 1979 she had been operating her account with the defendant bank. Except drawing a sum of Rs.8,000/- on 05.10.1983, she has not withdrawn any money from the respondent bank. However, Rs.24,750/- has been withdrawn through various cheques between October 1986 to July 1987 by forging her signatures. While the trial Court has held in favour of the plaintiff, the lower appellate Court has reversed the finding for the specific reason that the trial Court has shifted the burden of proof on the defendant bank without following the principles of burden of proof embodied in the law of Evidence. The lower appellate Court has also pointed out that there is no material evidence to show how the disputed signatures were compared or opinion of handwriting expert obtained. Just based on the judgment of criminal Court, the trial Court has concluded that forgery was committed.

10. 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 be fructified because of Thomas death, pending the suit.

11. 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 disputed 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 in criminal case, where it is required to prove positively that the signatures found in the cheques are that of the forgerer, to convict the forgerer.

12. Further, 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 is also reduced down for proper understanding of the 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 th 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."

13. 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.

14. 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 to operate 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. She also accepts that through Thomas she gave a requisition letter for additional cheque book and duplicate pass book.

15. It is contended by the learned counsel for the appellant that the trial Court has concluded its opinion on comparison of the signatures through naked eye exercising power under Section

73 of the Evidence Act, 1872 and the same is legally sustainable. 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.

16. The judgments of this Court in (i) Central Bank of India (A Nationalised 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. 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.

17. 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 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."

18. 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.

19. Considering the submissions made by the learned counsel appearing for the appellant and the respondent, the evidence let

in by the parties and the finding rendered by the Courts below, this Court holds that the appellant herein has failed to prove the signatures found on the disputed cheques marked as Exs.B3, B8 to B61 and Exs.C1,C3 and C5 are not signed by her. Mere oral submission that it was forged by her relative-cum-messenger viz., Thomas, is not suffice to hold that they are the forged documents. The judgment of the criminal Court based on the confession without trial, is not a proof of forgery. It is at the most a proof of conviction. The trial Court has held that those documents are forged documents without any basis. Though it is contended that under Section 73 of the Indian Evidence Act, 1872, the trial Court has compared the admitted signature with that of the disputed signature, there is no discussion by the trial Court about what are the documents he compared and the manner in which he compared the admitted documents with the disputed documents. It is also relevant to note that the disputed cheques exhibited are all photocopies and not the original.

20. Even Experts cannot form an opinion about the genuineness of a writing or signature found in a photocopy for multiple reasons. Primarily, the manipulation in photocopy cannot be ruled out. subsequently, apart from style of writing the pressure exerted at the point of beginning and at the point of conclusion by the writer is also relevant to compare the signature, which is not possible when the photocopies are subjected for comparison. In such circumstances, in the absence of any recording by the trial Court, how he arrived at a conclusion that the cheques are forged cheques, the lower appellate Court is right in pointing out the error and reversing the judgment of the trial Court.

21. Further more, the trial Court, without adequate evidence to hold forgery and without proper appreciation of evidence, solely relying upon the judgments rendered in criminal cases Exs.A3, A4, has concluded that all the cheques which are marked in the present suit, are forged documents.

22. It is pleaded by the plaintiff that her signature is a unique in nature and forgery can be easily identified. This Court to find out whether any uniqueness is available in the signature of the plaintiff, had a look at the signature of the plaintiff found in her deposition. To the eyes of this Court, no uniqueness could be seen. The signatures found in the deposition and the signatures found in the cheques marked as exhibits under B series are lookalike, but not identical. At this juncture it is relevant to point out, standard commentaries on Handwriting comparison invariable say that "no two signatures of a same person will be identical and no thumb impression of two different person will be identical".

23. It is also relevant to refer the opinion of the author of Bank Frauds-Prevention and Detection, IV Edition, Universal Law Publishing regarding unique signature, "it is true that the handwriting of each individual is unique and theoretically cannot be imitated. But most of us are callous or even ignorant that the signatures executed carelessly and limited to a few strokes would not contain sufficient individualizing features to make the uniqueness discernible, identifiable and imitation resistant.

24. That apart, it is the specific case of the plaintiff that her relative-cum-messenger has misused the cheques entrusted to him and she has also gone to the extent of criminal complaint against the said Thomas. While so, without impleading him as a party, the present suit has been filed. This error has been rightly pointed out by the lower appellate Court for dismissing the suit. While the plaintiff has failed to prove her case through best evidence available with her, the trial Court has wrongly shifted the burden on the defendant bank to prove the contrary.

25. As found in the commentaries as well as the provision of the Negotiable Instruments Act, 1881, the bankers are protected for their act done in good faith without negligence. In the present case, it is proved through the officers, who were dealing the accounts of the plaintiff at the relevant point of time that there was no negligence on the part of the bank. Further, it is the admitted case of the plaintiff that she used to take assistants of Thomas for operating her bank account and she admits that she requested the bank to give duplicate passbook and cheque book through Thomas and if really the plaintiff was not signatory to the cheques marked under B series, nothing prevented her from establishing the same by speaking herself by comparing her signature with that of the signature found in those cheques. Without resorting to that mode of proof it is futile to claim that the signatures found in the cheques are forged one and the bankers honoured those cheques negligently. When the forgery is not proved and contrarily diligent is established through evidence. There is no ground to interfere with the judgment of the lower appellate Court. Thus, the Substantial Questions of Law are answered accordingly.

26. In the result, the Second Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS II)

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Sub Assistant Registrar

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To

1.The II Additional Judge, City Civil Court, Madras

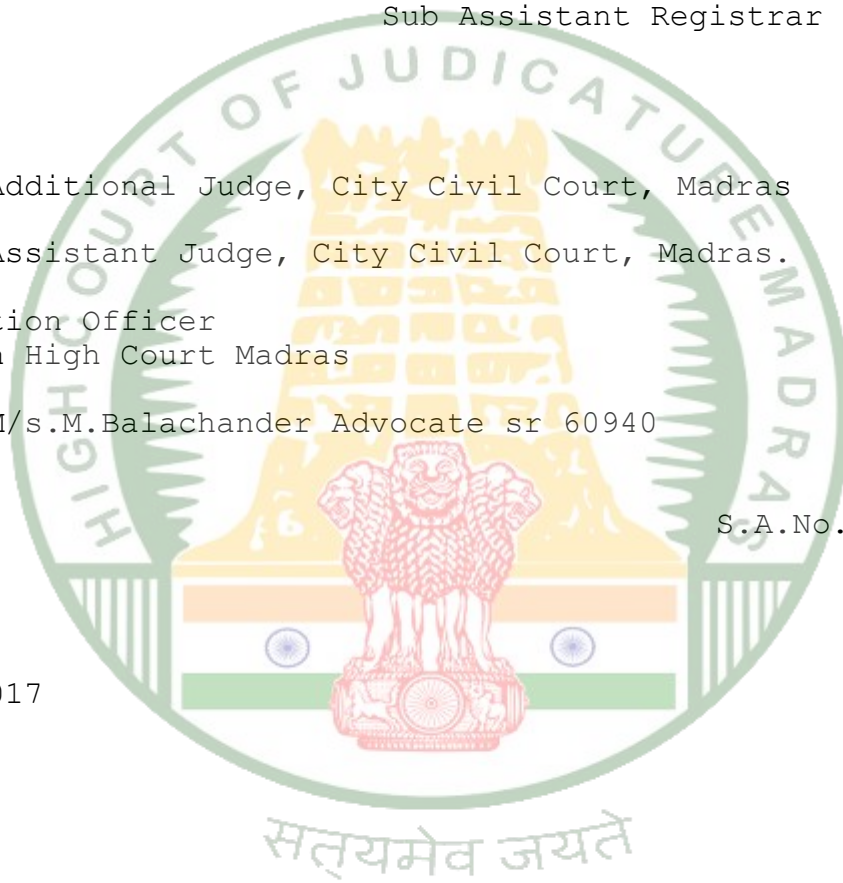
2.The II Assistant Judge, City Civil Court, Madras.

3.The Section Officer
VR Section High Court Madras

+1 cc to M/s.M.Balachander Advocate sr 60940

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