

(2010) 12 DEL CK 0198

Delhi High Court

Case No: Regular First Appeal No. 341 of 1996

The Hong Kong and Shanghai
Banking Corporation Ltd.

APPELLANT

Vs

Canara Bank and Another

RESPONDENT

Date of Decision: Dec. 21, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115, 144, 96
- Constitution of India, 1950 - Article 227
- Negotiable Instruments Act, 1881 (NI) - Section 10, 125, 131A, 20, 49

Citation: (2011) 3 AD 198

Hon'ble Judges: Valmiki J Mehta, J

Bench: Single Bench

Advocate: Dalip Mehra, for the Appellant; Pradeep Diwan, for the Respondent

Judgement

Valmiki J Mehta, J.

By the present first appeal u/s 96 of the Code of Civil Procedure, 1908 (CPC), the Appellant bank impugns the judgment and decree dated 12.1.1996 of the trial Court whereby the suit for recovery filed by the Respondent No. 1/Plaintiff was decreed. The suit for recovery was filed by the Respondent No. 1/Plaintiff bank on account of the said bank having been forced to pay twice with respect to one transaction i.e. under a second/duplicate bank draft which was issued by the Respondent No. 1 bank at the request of the Appellant bank and on the Appellant having furnished an indemnity bond dated 12.8.1981 (Ex.PW1/2) in favor of the Respondent No. 1 bank.

2. Though the judgment of the trial Court is a detailed judgment inasmuch as it deals with the liability not only of the Appellant bank which was arrayed as Defendant Nos. 1 & 2 in the trial Court, but also because the same deals with the liability of the collecting banker/Defendant No. 3/State Bank of Indoor who collected the proceeds of the first bank draft which was said to be materially altered. Though

the State Bank of Indoor was also held liable, the said bank has not challenged the impugned judgment and decree.

3. The facts of the case are that the Appellant bank approached the Respondent No. 1 bank for issue of a duplicate bank draft at the request of its customer M/s. Packard Watch Company. The first bank draft was payable in favor of M/s. Rivex Sales Corporation at the request of the customer of the Appellant bank. This first bank draft was issued by the Chandni Chowk Branch of the Respondent/Plaintiff bank and was payable at the Rajkot Branch of the Respondent bank. On account of the fact that this first bank draft was not received by M/s. Rivex Sales Corporation, the customer of the Appellant bank M/s. Packard Watch Company approached the Appellant bank for issue of a duplicate/second bank draft. The first bank draft was dated 10th July, 1981 for Rs. 57,525.07/-. On 12.8.1981, the Respondent bank issued a duplicate bank draft on the basis of indemnity bond Ex. PW 1/2.

4. After the payment was made under the second bank draft it transpired that the first bank draft was already encashed earlier on 24.7.1981 at the Gwalior Branch of the Respondent bank. Since the Respondent No. 1 bank had to make two payments under the same transaction, thus relying on the indemnity bond Ex. PW1/2 executed by the Appellant bank the Respondent No. 1 bank sued the Appellant bank as also the collecting banker M/s. State Bank of Indoor. It is this suit which has been decreed in favor of the Respondent bank by the impugned judgment and the decree.

5. Before this Court, the learned Counsel for the Appellant has argued his case under two broad heads. The first argument is that in terms of the indemnity bond, liability of the Appellant was to arise only in case the first bank draft was encashed after the submission of the indemnity bond and liability cannot arise in case the first bank draft was encashed before giving of the indemnity bond. The second argument was that the encashment of the first bank draft, whether pre or post the grant of indemnity bond, cannot be of any avail to the Respondent No. 1/Plaintiff inasmuch as the Respondent No. 1 did not act in due course and on the contrary acted with gross negligence thereby disentitling it to any defense either under the indemnity bond or under the provisions of the Negotiable Instruments Act, 1881.

Per contra, the counsel for the Respondent No. 1 has raised arguments under four broad heads. The first argument is that the indemnity bond is a complete defence because but for the indemnity bond the Respondent No. 1 bank would have never issued a second bank draft. The second argument is that the construction of the indemnity bond should be as per the intention of the parties and the doctrine of contra prefontum applies because even if there was an ambiguity in the language of the indemnity bond the same must be interpreted against its maker namely the Appellant bank. The third argument is that there is in fact no negligence on behalf of the Respondent No. 1/Plaintiff in making the payment of the second bank draft because payment of the same was made in due course and reliance for this

argument is placed upon Section 89 of the Negotiable Instruments Act, 1881. The last and fourth argument was that once there is detailed judgment of the trial Court, this Court sitting in appeal should not interfere.

6. In order to appreciate the controversy, it is necessary to firstly reproduce the applicable provisions being Sections 10, 87, 89 and 131A of the Negotiable Instruments Act, 1881. These provisions read as under:

Section 10. Payment in due course.-"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.

Section 87. Effect of material alteration .-Any material alteration of negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties; Alteration by indorse, And any such alteration, if made by an indorse, discharges his endorser from all liability to him in respect of the consideration thereof. The provisions of this section are subject to those of Sections 20, 49, 86 and 125.

Section 89. Payment of instrument on which alteration is not apparent.- 1[(1)]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 sum 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.

Section 131A. Application of Chapter to drafts.-The provisions of this Chapter shall apply to any draft, as defined in Section 85A, as if the draft were a cheque.]

Along with the aforesaid provisions, it would be necessary to refer to the language of the indemnity bond dated 12.8.1981 and the same is therefore reproduced below:

The Manager
Canara Bank
Chandni Chowk
DELHI

Place DELHI
Date 12 Aug 8

Dear Sirs,

In consideration of your issuing to us a duplicate of the Demand Draft No.DCJ/034464/17764 dated 10/7/81 for Rs.57525/07 (Rupees Fifty Seven thousand five hundred twenty five and Paisa seven only) favouring M/S RIVEX SALES ENTERPRISERS, AJKOT which original draft has been lost, the undersigned (1) Mercantile Bank Limited Chandni Chowk, DELHI (2) _____ Surety) (Name & address) _____ Undertake to indemnify you and hold you harmless against any loss or damage, claim mands which you may sustain in consequence of issuing to us a duplicate of the above Demand Draft, by reason of any subsequent production or negotiation of the missing original Demand Draft or by any action or proceedings in respect thereof. We (NO.1) do hereby declare that the said original Demand Draft has been lost. Enclosed is a letter from M/S Rivex Sales Enterprises, Rajkot, the ayee of the said draft to the effect that they have not come into possession thereof.

We do hereby undertake to return the original draft in case it case it comes into our possession hereafter without dealing with it in any manner.

Witnesses:

Yours faithfully

Besides the indemnity bond, the subject bank draft namely the first bank draft will also have to be examined alongwith relevant pleadings and the testimonies of the witnesses of both the parties. This first bank draft is reproduced as under:

7. Before I take note of the issues on which the present appeal has to be decided, I may note that it is not the case of the Respondent No. 1/Plaintiff bank that even if it is guilty of negligence or that payment under the first bank draft was made in spite of a material alteration, even then, it was still exempted from any liability for payment under the indemnity bond.

8. Now to crystallize the issues. The issues are two in number. The first issue is that whether in terms of the language contained in the indemnity bond, the Respondent No. 1 bank was indemnified only if there was encashment of the first bank draft subsequent to giving of the indemnity bond and would not indemnify the Respondent No. 1 bank if the first bank draft has already been encased prior thereto. The second issue, and which is the issue which I will in fact deal with first, as it is the main and the only issue really to be decided, is whether the payment of the first bank draft was a payment in due course and the material alteration or fraud was not such which could have been detected by the Respondent No. 1/Plaintiff bank for it to take benefit of Section 89 of the Negotiable Instrument Act, 1881.

9. I have already reproduced the indemnity bond and the subject bank draft being the first bank draft above. A reference to the subject bank draft shows that undoubtedly the bank draft which as originally drawn was payable at the Rajkot branch of the Respondent No. 1/Plaintiff bank, however, the name of the original paying/drawee branch has been scored off and the word Gwalior Branch has been

written in place thereof. There is thus a clear cut material alteration in the bank draft and which is obvious on the face of the instrument. However, there is an important aspect in this bank draft, and which will be crucial for determination of the present appeal, and which is that there is a second genuine signature of the person/officer who made the bank draft on behalf of the Respondent No. 1/Plaintiff adjoining the name of the altered drawee branch. Can it be thus argued that by virtue of the second signature there is authentication of the change of paying branch and thus payment has been made in due course as per apparent tenor.

A reference to Sections 89 and 10 reproduced above shows that in case the payment is made in due course, then, Respondent No. 1/Plaintiff would be entitled to claim the amount under the indemnity bond. Can it be said that payment has been made in due course and there is no apparent alteration in the subject bank draft (payment having been made as per the apparent tenor) so as to entitle the Respondent No. 1/Plaintiff to the benefit of the indemnity bond and Section 89 read with Section 10 of the Negotiable Instruments Act, 1881.

10. Before I examine this issue further, I may state that in the plaint, the Respondent No. 1/Plaintiff has taken up a specific case of payment having been made in normal and regular course of business in para 6. The Appellant bank has in its written statement taken up a specific defense that payment has not been made in ordinary course of business, vide preliminary objection No. 2(iii) of the written statement. The issue which then arises is that whether these respective pleadings have been proved by the respective parties. Undoubtedly, this is a peculiar case where though there is a material alteration of the branch at which the subject bank draft is drawn from payment from Rajkot to Gwalior, however, there admittedly appears a genuine signature of the officer who made out the bank draft and in a manner it can be so read to suggest authentication of the change for sustaining the stand of payment in due course as per the apparent tenor of the bank draft that it was in fact payable at changed Gwalior Branch. On this second signature existing on the subject bank draft it can be argued that it led the officer at the altered branch in the bank draft to arrive at a bonafide conclusion that the original branch at which the payment had to be made has been scored off from Rajkot to Gwalior with a due authentication. If the Respondent No. 1/Plaintiff in its evidence had accordingly so averred, then, in my opinion, it was open to the Respondent No. 1/Plaintiff to claim that the payment was made without any negligence and in due course and apparent tenor in terms of Section 89. However, the fact of the matter is that none of the witnesses of the Respondent No. 1/Plaintiff bank, much less a witness from the Gwalior branch has stepped into the witness box, that the Respondent No. 1's officers took the second signature as authentication of change of the drawee branch from Rajkot to Gwalior. Not only that, in the cross-examination of the Respondent No. 1/Plaintiffs witness PW-4 Sh. Bhawani Shankar has volunteered to say that the second signature was merely because he had got the power of signing only a few days back and therefore in order to avoid any discrepancies in the signature and resultant inconvenience to

the parties a second signature was put on the bank draft i.e. the witness did not say that the second signature is for authentication for the changed branch. The issue thus which boils down for being decided is whether by putting a second signature on the bank draft, has the Respondent No. 1/Plaintiff bank in any manner allowed the forgery/material alteration to take place on the subject bank draft and consequently it cannot claim the benefit of payment in due course as per apparent tenor.

11. At this stage, it would be fruitful to refer to the observations made by the Supreme Court in the case of [Canara Bank Vs. Canara Sales Corporation and Others,](#) , which read as under:

26. xxxxxxx According to the learned Lord Chancellor, leaving blank spaces on either side of the figure "2" in the cheque amounted to a clear breach of duty which the customer owed to the banker. The learned Lord Chancellor said: (AC p. 811) "If the customer chooses to dispense with ordinary precautions because he has complete faith in his clerk's honesty, he cannot claim to throw upon the banker the loss which results. No one can be certain of preventing forgery, but it is a very simple thing in drawing a cheque to take reasonable and ordinary precautions against forgery. If owing to the neglect of such precautions it is put into the power of any dishonest person to increase the amount by forgery, the customer must bear the loss as between himself and the banker.

27. The principles so settled by the House of Lords was pressed into service before this Court in the above case. This Court held that the principle settled by the House of Lords could not help the bank. The accepted principle that if the signatures on the cheque is genuine, there is a mandate by the customer to the bank to pay was reiterated. It was also held that if an unauthorized person got hold of such a cheque and encased it, the bank might have had a good defense but, however, if the signatures on the cheque or at least one of the signatures are or is not genuine, there is no mandate on the bank to pay and the question of any negligence on the part of the customer, such as leaving the cheque book carelessly so that a third party could easily get hold of it would afford no defense to the bank. This Court distinguished Macmillan case 2 observing, that if any of the signatures was forged the question of negligence of the customer in between the signature and the presentation of the cheque never arose. The suit was however, dismissed on another point and that of jurisdiction.

(Emphasis added)

Two propositions emerge from a reading of the ratio of the Supreme Court in the aforesaid judgment in Canara Bank's case. Firstly, any negligence is not good enough to exempt the drawer of a cheque from making the bank which has made payment under the cheque liable, and, it is only a case where negligence is such that it has put power in the hands of a dishonest person to increase the amount of

forgery, is the customer liable to bear the loss as between himself and the banker. Secondly there is no mandate only if the signatures are forged and which is not the issue in the facts of the present case as the Respondent No. 1 does not deny the signatures of its officer on the first bank draft.

Applying the first proposition to the present case one finds that the positioning of the second signature in the subject bank draft in the facts of the present case is therefore very crucial. The positioning of the second signature on the subject bank draft is such that I would hold that the officer of the bank has allowed the forgery and material alteration to be committed in the bank draft. This I say so because the second signatures are immediately adjoining the branch which had to make the payment originally under the draft viz Rajkot Branch. If a second signature appears near the branch which had to make the payment, the bank officers with their expertise, wisdom and experience ought to know that this second signature could be taken for altering the designated branch where the payment had to be made. In fact, I would go to the extent of saying that the peculiar facts of this case are such that the existence of a second signature would have ordinarily entitled the Respondent No. 1/Plaintiff of the defense of payment in due course inasmuch as the second signature put by the bank officer could have been used as abases to prove that it is this honest action which made the officer at the Gwalior Branch made the payment so that the payment becomes payment in due course, however, I have already noted above, the testimonies of the witnesses on behalf of the Respondent no1./Plaintiff are not so given that these signatures caused an honest belief in the officer at the branch at Gwalior for making payment. Clearly, therefore, the making of the second signature has allowed material alteration/forgery in the bank draft and the positioning of the second signature in the peculiar facts of this case read with the ratio of the judgment of Canara Bank leads to the conclusion that the Respondent No. 1/Plaintiff has caused more than necessary negligence so as to enable a material alteration on the bank draft. Consequently, the blame must squarely lie at the door of the Respondent no. 1/Plaintiff and its experienced officers who made this mistake because the resultant position is that payment has been made under a bank draft which on the face of it is materially altered and thus payment under the same is not in due course as per the apparent tenor to enable the Respondent No. 1 to claim the benefit of Sections 10 and 89 of the Negotiable Instruments Act, 1881.

12. The second issue is with regard to the language of the indemnity bond. The issue is that can the language of the indemnity bond indemnify the Respondent no. 1/P plaintiff because the object and intention allegedly of the said contract/indemnity bond is to exempt the Respondent No. 1/Plaintiff from any and every action and any and every liability on account of encashment of the first bank draft. I have already reproduced the complete indemnity bond above. There is no doubt that a contract would be read against its maker, i.e., the person, who drafted the same and also that it should be read in accordance with the intention of the

parties however, I do not find that the language of the indemnity bond is in any manner ambiguous or uncertain so as to call for different interpretations of the same. A reading of the indemnity bond shows that the Respondent no 1/Plaintiff was indemnified by the Appellant bank for any and every loss for issuing of the duplicate demand draft by reason of subsequent production or negotiation of the first missing original bank draft. It is an admitted fact that in the present case, the payment under the first bank draft was made prior to the giving of the indemnity bond and not post the execution of the indemnity bond. A literal construction of the indemnity bond therefore may lead to the conclusion that the liability of the Appellant should only arise if the first bank draft was paid prior to execution of the indemnity bond. In this case, however, I need not go to the niceties of the interpretation of the language and decide this second issue because the admitted stand of both the parties is that if payment of the first bank draft, whether pre-execution of the indemnity bond or post execution of the indemnity bond, is such that the same amounts to clear cut gross negligence on behalf of the Respondent No. 1/Plaintiff, then, the language of the indemnity bond will not entitle Respondent No. 1/Plaintiff still to claim benefit of the indemnity bond and file a case for recovery against the Appellant/bank.

Learned Counsel for the Respondent No. 1/Plaintiff placed great emphasis on paragraphs 76 to 78 of the impugned judgment to contend that these findings of the trial Court are correct findings and therefore should be upheld and the Appellant bank should be held liable. To this argument, all I need to say is that in terms of the judgment of the Supreme Court in the case of Canara Bank, and the peculiar facts of the positioning of the second signature by experienced bank officers clearly leads to the conclusion that it is in fact the Respondent No. 1/Plaintiff who has caused negligence and therefore the loss upon itself.

13. The final argument on behalf of the Respondent No. 1/Plaintiff was that this Court should not interfere in the exercise of its powers u/s 96 once two views are possible because the view of the trial Court is one possible view. Of course, there cannot be any cavil to this aspect, however, it is equally settled law that where the judgment of the first court clearly miss-reads and mis-applies the relevant provisions of law in the facts of the individual case, and which causes grave injustice and prejudice, this Court is entitled as the first appellate Court to interfere with the findings of the trial Court. This Court as the first appellate Court is entitled to examine the findings of both the facts and the law to see that the same are not perverse/illegal and the powers of an appellate Court in this behalf are distinguishable and wider than the power of Courts which exercise re visionary powers u/s 115 CPC jurisdiction or jurisdiction of superintendence under Article 227 of the Constitution of India. As I have already dealt with in detail above, in the present case, the language of the indemnity bond does not assist Respondent No. 1/Plaintiff in the peculiar facts where the second signature has caused the language of the bank draft to be materially altered and forgery be caused upon the same.

Further as again already stated above, it is not the evidence of any of the witnesses of the Respondent No. 1/Plaintiff that the payment was made at the Gwalior Branch because the second signature was taken as authentication of the change from the Rajkot to the Gwalior Branch.

14. In view of the above, the impugned judgment and decree to the extent which holds the Appellant liable is clearly to be faulted with. The impugned judgment and decree is therefore to the extent it holds the Appellant liable to be set aside and the suit against the Appellant/Defendants no 1 and 2 shall stand dismissed leaving the parties to bear their own costs.

Learned Counsel for the Appellant states that the Respondent No. 1/Plaintiff has received the amount under the impugned judgment and decree in execution of the decree. If that be so, it is open to the Appellant bank to apply for restitution in terms of Section 144 CPC. Trial court record be sent back.