

(1976) 05 CAL CK 0023

Calcutta High Court

Case No: Civil Revisional No. 1017 of 1974

Ogurmull Choudhury and Co.

APPELLANT

Vs

Central Bank of India and
Another

RESPONDENT

Date of Decision: May 7, 1976

Acts Referred:

- Contract Act, 1872 - Section 212, 230
- Negotiable Instruments Act, 1881 (NI) - Section 105, 32, 61, 62, 64

Citation: 80 CWN 825

Hon'ble Judges: P.K. Chanda, J

Bench: Single Bench

Advocate: S.L. Saraf and M.P. Choudhuri, for the Appellant; S.N. Tagore, for the Respondent

Judgement

P.K. Chanda, J.

This Rule has been directed against the judgment and order dated 4.12.73 passed by the Full Bench of the Presidency Small Cause Court, Calcutta, reversing those dated 22.6.72 passed by the learned third Bench of the said court in suit No. 1902 of 1971. The suit was instituted by the petitioner-plaintiff against the two branches of the Central Bank of India - one at Burrabazar in Calcutta (Opposite Party No. 1) and the other at Banda in U.P. (Opposite Party No. 2) on the following allegations: The plaintiff-petitioner purchased 222 bags of Moong of M/s. Ram All Laura who dispatched the same from Mari to Howrah under R/R No. 432641 dated 14.3.70 and on 16th March, 1970 he made over the said railway receipt to the defendant No. 2 along with the Hundi for Rs. 23,000.00 being the price of the same goods drawn by M[s. Ram Lal Laluram upon the plaintiff-petitioner with instruction to deliver the said Moong to the plaintiff-petitioner against payment of the aforesaid amount. The defendant No. 1 - the Central Bank of India at Kalakar Street, Calcutta presented the said Hundi to the plaintiff at 1-30 p.m. on 28th March, 1970 which was a Saturday.

The plaintiff on payment of the sum of the said Hundi and on delivery of the R|R on March 30, 1970 immediately presented the same for delivery to the Railway Administration and took delivery of the goods on the same date. But it had to pay a sum of Rs. 642.00 on account of wharfage or demurrage as the goods had arrived at the destination long before the Hundi was presented to the plaintiff. Owing to delay in presentation of the Hundi and the subsequent delay in the delivery of the R|R to the plaintiff, the plaintiff had to pay the demurrage. The R|R and the Hundi ought to have been presented in the usual course to the plaintiff by 18th March, 1970. Owing to the inordinate delay in presenting the Hundi and the R|R the plaintiff suffered loss and damages amounting to a sum of Rs. 642.00 by way of demurrage and a further sum of Rs. 888.00 on account of loss of profit due to fall in the market price. The defendant, it was alleged, wrongfully realised a sum of Rs. 75.61 as interest from the plaintiff which they were not entitled to do in view of the delay in presenting the Hundi and the R|R. The total claim was laid at Rs. 1,605.61.

2. The defendants alleged that there was no privity of contract between the plaintiff and the defendants and as such the defendants had no liability whatsoever to the plaintiff; that there was understanding that the drawer shall intimate the drawee about the despatch of the documents and the defendant Bank shall not be liable either to the drawer or to the drawee for delay in presentment of the bill or in sending intimation of the bill to the drawee in Calcutta; that the defendant No. 1 presented the Hundi and R|R to the plaintiff sufficiently ahead of the closing of the banking hours of the 20th March, 1970 and not at 1-30 p.m. as alleged; that there was no delay in presentment of the Hundi or in delivery of the R|R; that the documents in question were posted by the Banda Office of the defendant No. 2 on or about 16th March, 1970 for delivery to the defendant No. 1 in Calcutta. The documents were delivered at the office of the defendant No. 1 on 21.3.70 which was a Saturday and there was no time for taking any action on the said bill and that 22nd and 23rd March, 1970 were bank holidays. The defendant No. 1's diary department received the bill on 24th March, 1970 from where in usual course of business it was forwarded to the I.B.C. department of the Bank; that the drawee's men could not be found or contacted by the messengers of the defendant No. 1 on the 25th and the 26th March, 1970 despite attempts; and 27th March, 1970 was a holiday. The documents were presented on 28th March, 1970 in the early banking hours to enable the drawee to release the documents on the same date; that the defendant's realisation of interest was not illegal.

3. The trial court decreed the suit on the findings that there was inordinate delay on account of carelessness on the part of opposite party No. 1 in presenting the papers to the petitioner-plaintiff. In arriving at such finding the trial court found that on the 16th March, 1970 M|s. Ram Lal Laluram made over the R|R and the Hundi representing the price of the goods drawn by the consignee on the petitioner to OP. No. 2 with instruction to deliver documents to the petitioner on payment of the amount of the Hundi. In holding so, the trial court observed :

In the final analysis from the evidence on record I have reason to conclude that the documents were received by the Central Bank, Burrabazar Branch on 20.3.70 at the latest and even excluding the holidays the contradiction in the Bank's reply letter to the plaintiff with that of the testimony of the Bank's witnesses before me as to the story that Gopal Routh went to the guddi of the plaintiff on 26 and 27th stands miserably discredited. I have no doubt from the screening of evidence that the Central Bank, Burrabazar Branch, failed in its duty to the drawee with whom it had contractual relation to give service with due diligence and promptitude. On the contrary, the Bank charged interest from the plaintiff from 20 to 29.3.70 in indecent haste. In my opinion, the Bank ought to have been more service conscious before being right conscious. That the plaintiff suffered loss due to the demurrage it had to pay and the falling market price have been proved before me without a challenge by the exhibits mentioned above.

While holding that there was privity of contract between the plaintiff and the defendant No. 1 the trial court referred to certain observations in the case of [Seth Jagjivan Mavji Vithlani Vs. Ranchhoddas Meghji](#), :-

It is acceptance that establishes privity of contract on the instrument between the payee and the drawee and we agree with the learned Judges of the High Court that unless there is such acceptance, no action on the bill is maintainable by the payee against the drawee.

In regard to the fall in market price and demurrage charged by the Railways, the trial court observed :-

Next there is no counter evidence regarding the market fall or demurrage charged (Ext. 3) Exts. 5 and 5 (a) dated 21.3.70 and 1.4.70 show the market rates of moong which the plaintiff sold in Calcutta.

Regarding the findings of the trial court that there was contractual relationship between the plaintiff and the defendants with regard to the delivery of the Hundi and the R|R, the Full Bench observed :-

It is in evidence that this hundi or bill of exchange was submitted by Ramlal Lalluram (the drawer) to the Banda Branch of the Central Bank of India with instruction to deliver the relative R|R against payment of the hundi and to return the bill if the drawee refused to accept the bill (vide Ext. A). It is quite clear, therefore, that there was a contract as between the drawer and the payee in respect of the delivery of the relative R|R to the plaintiff. But the fact that the defendants entered into a contract with the drawee to present the hundi or bill of exchange to the plaintiff, the drawee, and to deliver the R|R in question to the plaintiff on payment of the amount of the hundi cannot lead to any inference that there was a contract as between the defendants on the other with regard to the delivery of the R|R in question to the plaintiff.

Thereafter, the Full Bench referred to sections 32, 61 and 64 of the Negotiable Instrument Act and observed:

The aforesaid provisions of the Negotiable Instruments Act make it abundantly clear that a bill of exchange is required to be presented to the drawee by the holder of bill, and it is only when the drawee accepts the bill that he becomes liable to the holder. Now, if the drawee does not accept the bill on presentation, the bill is dishonoured and in such even the holder has no remedy as against the drawee whatever rights and remedies there might be as between the drawer and the holder.

There is no provision in the Negotiable Instruments Act whereby a contractual relationship is created as between the drawee and the payee (or holder) of a bill of exchange.

4. With reference to the decision in the case of [Commissioner of Income Tax, Bombay City Vs. Ratilal Nathalal](#), as relied upon by the trial court, the Full Bench observed that the learned Judge of the trial court "misquoted and misunderstood the judgment." According to the Full Bench in that judgment there was no observation with regard to the privity of contract at all, and as such decision in Seth Jagjivan's case is no authority for the proposition that as soon as a bill is presented to and accepted by the drawee, a privity of contract arises between the payee and the drawee. In fine, the Full Bench disagreeing with the trial court held that there was no contract as between the plaintiff and the defendants with regard to the delivery of the R/R in question by the defendants to the plaintiff.

5. Assuming the findings of the trial court that there was unreasonable delay in presentation of the documents to the plaintiff by the Central Bank, Burrabazar Branch, the Full Bench observed: -

As has been noticed here in above, the plaintiff was the drawee in respect of the hundi. Although the defendants might have some obligation towards the drawee to take any care, far less reasonable care. Such being the case, the plaintiffs, though it might have suffered damage or loss because of delay in presentation of the documentary bill of exchange to it by the defendants, cannot claim any compensation as against the defendants.

6. Having regard to the fact that the plaintiff with full knowledge of the delay in delivering the papers and that it was to suffer loss, the Full Bench observed that "It was open to the plaintiff to refuse to honour the bill of exchange. But once it accepted the bill of exchange and thereafter paid the amount of the bill to the payee, it cannot hold the payee liable for damages in as much as the defendants were under no duty to take care towards the drawee for presentation of the bill." The Full Bench on the aforesaid findings overruled the plaintiff's claim for damages.

7. At regards the interest, the Full Bench found that the Bank was justified in charging interest in view of the fact that the bill of exchange was presented by the defendants to the plaintiff on 28.3.70 and the same was accepted on the same day but the bill was paid on 30.3.70 and there was no justification for not making the payment of the hundi on the day of presentation and acceptance.

8. Mr. Saraf, appearing on behalf of the petitioner, has submitted that the Full Bench acted illegally and in material irregularity in exercise of its jurisdiction in holding that there was no contract between the petitioner and the opposite parties and as such the opposite parties had no duty towards the petitioner and in not holding that the Hundis Ext. A payable on demand must have been presented for payment within a reasonable time after it was received by the Burrabazar Branch of the Bank and that the delay in presentation was not due to reasons beyond the control of the Bank. It has been further submitted that the Full Bench is wrong in its application of the ratio decidendi in the case of [Seth Jagjivan Mavji Vithlani Vs. Ranchhoddas Meghji](#). He has also urged that even if the court finds that there was no contract between the plaintiff and the defendant, in that case also the defendant bank cannot get rid of the liability as an agent of the consignor.

9. Mr. Tagore, appearing on behalf of the opposite parties, while supporting the order of the Full Bench has contended that there was no stipulation with the petitioner that intimation was to be given of the arrival of the papers to the petitioner and there is no specific case of the petitioner that the delivery was to be made or Hundi tendered within certain date. His further contention was that there being no privity of contract between the plaintiff and the defendants the plaintiff's claim is not maintainable. He has also pressed into service the question of waiver.

10. Section 105 of the Negotiable Instruments Act provides that in determining what is a reasonable time for presentment for acceptance or payment, regard shall be had to the nature of the instruments and in calculating such time, public holidays should be excluded. That apart regard is to be had also to the facts of the case. The question of reasonable time is not purely one of fact but is a mixed question of law and fact. The tests or standards for determining whether a collecting Banker's conduct is negligent, one of the tests is "Ordinary practice of Bankers" and that this test has received the blessings of the Privy Council in *Commissioners of Taxation v. English, Scottish and Australian Banks Ltd.* (1920 A.C. 683).

11. There is nothing on record to suggest that the petitioner was a customer of the Burrabazar Branch of the Central Bank of India. The customer is a person who has "some sort of an account, either deposit or current account or some similar relation" with a banker. (Lord Davey in *G. W. Railway v. London and Country Bank*, (1901) A.C. 414). The mere rendering of some services incidental to, though not peculiar to, banking business will not, however, constitute the person to whom the service is rendered a customer. It is only when a banker performs certain duties on behalf of the customer it acts as an agent. In the instant case the advancing of money by the

Banda Branch of the Bank, the handing over of the Hundi and the Railway Receipt - together form one transaction. Their combined effect was that the bank would be in control of the goods till payment was made by the petitioner. "This is a well known practice followed by Bankers. The Judicial Committee both in 43 Ind. Appeal 164 (A.I.R. 1916 P.C. 7) and AIR 1934 246 (Privy Council) held that such transaction was a pledge." ([The Morvi Mercantile Bank Ltd. and Another Vs. Union of India \(UOI\),](#)). The subject matter of a pledge usually consists of goods and chattels capable of actual or constructive delivery; but other forms of personal property including negotiable instruments may be the subject of such a contract. A pledge of "document of title to goods" is a pledge of goods represented by them and not merely pledge of actual documents. Thus a pledge of railway receipt is a pledge of goods themselves to which the receipt relates. In this connection reference may be made to Halsbury's Laws of England, Vol. XXV p. 4, Carter v. Wake, 4 Ch. D. 605; Harold v. Plenty, (1901) 2 Ch. 314 ; [R.D. Sethna Vs. The National Bank of India,](#) , [Arjun Prasad and Others Vs. Central Bank of India Ltd.,](#) . In Off. Ass. Madras v. Mercantile Bank (1934) 61 LA. 416.

12. The Burrabazar Branch of the Bank had nothing to do with the transaction except collection of the money on presentation of the relevant papers and remit the money if collected to the Banda Branch of the Bank. A branch of a bank is an agency of the Head Office. For certain special purposes of banking business they are however treated as different banks. ([Hansraj Bajaj Vs. The Indian Overseas Bank Ltd.,](#)). At page 167 of the book Banking in Socialist Economy with special regard to East West Trade by Ivan Mezneries, the author has observed: -

A practice, supported also by judicial decisions, has developed as to this debated issue, establishing that the branch offices of a bank inspite of the bank being a coherent legal entity - shall be considered independent banks as far as their accounts and clearing operations are concerned.

13. It has been rightly observed by the Full Bench of the Presidency Small Causes Court, Calcutta, that a Hundi is nothing but a bill of exchange. As has been observed in Biswanath v. Grinda, 23 CWN 534 they are sometimes bill of exchange and at other times promissory notes. A bill of exchange may include a Hundi but a Hundi does not include a bill of exchange. There are two kinds of presentment of bill of exchange-presentment for acceptance and presentment for payment. In the instant case M/s Ramlal Laluram is the drawer, the petitioner is the drawee and the Bank was the payee. There was no contract between the petitioner and the opposite parties with regard to the delivery of the R/R and the Hundi though of course there was a contract between M/s. Ramlal Laluram and the petitioner. So far as M/s. Ramlal Laluram and the opposite party Bank are concerned the contract has been duly performed -at least there is nothing on the record to suggest that M/s. Ramlal Laluram and the Bank still have obligations to perform. As an agreement is made between contracting parties, a contract cannot confer either rights or liabilities on

one who is not a party to it. The fundamental principle that a stranger to a contract cannot enforce it is well-settled. It cannot be denied that where a cheque or bill or any other document is entrusted by a customer to a banker for collection the banker receives the same and collects its amount as an agent for customer. In the instant case, M/s. Ramlal Laluram and not the petitioner was the customer. The relation between the banker and the customer is either that of a creditor and debtor or of the agent and the principal. The principal function of a banker in which it stands in a fiduciary relation as agent to his customer is collection of bills of exchange and other documents for customers. In so collecting the banker acts as a mere conduit pipe to receive payment and it holds the proceeds at the disposal of the customer and if it had already made payment to the customer to adjust the collected amount towards its dues from the customer. "Since an agent is employed to establish privity of contract between his principal and a third party, it is the general rule that he acquires no right and incurs no liabilities in respect of these contracts into which he enters in the capacity of agent." (Anson's Law of Contract--21st Edition--page 524). The most important instance is where the agent is personally liable on the contract, for it is only reasonable and just that an agent from whom a remedy for breach of contract can be sought by the third party should himself be able reciprocally to enforce the contract. But it is essential here (as where the agent's liability is in question) that the agent has contracted personally. Section 230 of the Contract Act provides that as a general rule an agent who enters into a contract on behalf of his principal is not entitled to sue nor is he personally liable on the contract. It is the principal who can enforce it and can be held liable to the third person--seller or buyer.

14. Section 212 of the Contract Act lays down a general test which is that of the conduct of an ordinary prudent man under the like circumstances. An agent is bound to conduct the business of the agency with as much skill as it generally possessed by persons engaged in similar business and he is bound to act with reasonable diligence, failing that he is to make compensation to his principal. In the instant case the principal M/s. Ramlal Laluram has no grievance against the bank. By the term reasonable skill being meant such skill as is ordinarily possessed by men of that profession or business and by ordinary diligence being generally understood, a degree or diligence adequate to the management of the particular transaction. In order to decide whether the agent has in any particular case exercised a proper degree of skill and diligence, regard must be had to the question whether he has acted in the same manner as other persons of experience and skill, exercising the same profession, would have acted under similar circumstances. The expression "gross negligence" in contrast with the unqualified sort of negligence for which the agent will be liable, indicates that something more than lack of skill is required before an agent is liable for misfeasance in respect of the undertaking. Mere delay does not per se indicate negligence. There is no allegation in the plaint that the bank acted malafide or there was wilful negligence. The only allegation in

the plaintiff is that there was inordinate delay in presenting the Hundi and the R/R. No lack of reasonable care on the part of the Bank was whispered. The expression "wilful neglect" has been judicially interpreted as meaning that the act is done deliberately and intentionally and by accident or inadvertence, but so that the mind of the person who does the act goes with it (*Tomboli v. G.I.P. Rly.* (1928) 52 Bom 169 (176) P.C.).

15. As earlier noticed there was no contract between the petitioner and the Bank. The Bank at best was Mercantile Agent, apart from the question of being a pledge, of the seller who was known to the petitioner.

16. Let us see in what case the agent will be liable to third persons, for wrongs committed by him in the course of his employment. The general rule on this subject is stated by Lord Chief Justice Holt as follows :

A servant or deputy, quantum such, cannot be charged for neglect, but the principal only shall be charged for it; but for misfeasance an action will lie against a servant or deputy, but not quantum a deputy or servant, but as a wrongdoer." (*Lane v. Cotton*, 12 Mod 473 (488). Reference may also be made to page 246 of the book -on Mercantile Agency by Russel).

17. From what has been observed above it follows that if the agent, whilst acting in that capacity, be guilty of any misfeasance with reference to the property of a third person, he will be liable to third person for all damages which the third party may sustain by reason of his tortious act, whether that act has been done bonafide by command of his principal and for his benefit, or at the mere will and for the benefit of the agent himself. In the instant case there was no fraud or misrepresentation and the petitioner was not induced to deal with the Bank thereby. Nor there was any misfeasance with reference to the property of the petitioner. "An agent or servant, except in the case of a master of a ship, is not liable to third parties for acts of negligence but he is liable for acts of misfeasance..... The rule is that an agent is personally liable to third parties for doing some thing which he ought not to have done but not for not doing something which he ought to have done. In the latter case the agent is liable only to his employer." (*Principal and Agent in Contract and Tort* by Evans). The instant case does not come under the first part of the said observations in view of what has been stated in the plaintiff.

18. Section 64 of the Negotiable Instruments Act lays down that promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof, by or on behalf of the holder. In default of such presentment, the other parties thereto are not liable thereon to such holder. The exception to this sec. provides that where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker thereof. There are two cases in which presentment for acceptance is necessary. (Vide Section 61). Section 62 deals with the necessity of the

presentment for sight of notes payable a certain period after sight and the effect of non-presentment. Where presentment for acceptance is necessary, in default of such presentment by the holder, the drawer and all the endorsers are discharged from liability to the holder making such default and no action is maintainable even in respect of the debt or other consideration for which the bill was given. (Soward v. Palmer (1818) 8 Taunt 277). There was no stipulation in the instant case requiring presentment. In the absence of any express stipulation requiring presentment, presentment for payment is not necessary to charge the maker of a note or the acceptor of a bill, for they are the principal debtors on these instruments. The reason for this rule is that by the common law a debtor is bound to seek out his creditor and pay him. (Walton v. Mascall (1844) 13 M.C.W. 452). In Baldeo Prosud v. Ramkali, AIR 1862 All. 123, it has been held that presentation of a promissory note or a bill of exchange as contemplated by Section 64 is necessary only if the payment is to be made at the place of the debtor, not if it is to be made at the place of the creditor. Under sec. 64 the result of non-presentment of hundi for payment is not the exemption of the acceptor from liability but the exemption of only other parties to the hundi. As has been held in the case of [Benares Bank Limited Vs. Hormusji Pestonji and Others](#) the acceptor of the hundi remains liable under it in spite of the fact that it was not presented for payment. Clauses (b) and (c) of Section 76 deal with cases in which presentment for payment is waived. A waiver of presentment may be express or implied, and may be made at any time before or after maturity. (Jandu Lal v. Wilayati Begum, 47 All. 572). Clause (c) of Section 76 states that such implied waiver may be inferred if the party makes a part payment on account of the amount dues thereon; or (2) waives his right to take advantage of any default in presentment for payment. If the petitioner considered that there was unreasonable delay in presentment he might refuse the bill. Instead he made the full payment. An implied waiver can, therefore, be gathered from the conduct of the petitioner in as much as he paid the bill with notice of the alleged unreasonable delay in presentment and the bank was lulled to sleep by his conduct. In other words, the petitioner ratified the action of the bank. It has been earlier pointed out that the position of the bank was that of a pledgee and the petitioner had right of redemption. By the common law a debtor is bound to seek out his creditor, pay him and redeem the pledge.

19. In view of the discussions made above, the petitioner is not entitled to any compensation or damage. The only other matter that remains to be considered is whether the bank was justified in realising the sum of Rs. 75.61 as interest for the period 20-3-70 to 29-3-70. Section 79 of the Negotiable Instruments Act deals with the rate of interest and the time from which and upto which, it is to be calculated. The rate as specified in the instrument is to be calculated from the date of the instrument upto the time of tender or realisation of the amount of the principal money. This section gives the court discretion as to time to which it shall allow interest. Section 80 governs cases in which interest is mentioned in the instrument

but no rate of interest is specified as well as cases in which no mention is made of interest at all. It does not appear that any dispute was raised by the petitioner regarding the rate of interest. Even u/s 80 the liability for interest on a promissory note payable on demand carries from the date of the note and not from the date on which a demand is made for payment. (Farmroz v. Mahomed, 28 Bom L.R. 141). In view of the provision of the two sections referred to earlier and in view what the Full Bench has said, I do not think that the Full Bench was wrong in allowing the interest. The contentions raised by Mr. Saraf cannot be upheld in view of the discussions made above. I find no substance in the instant application.

The application is rejected and the Rule is discharged. There will be no order as to costs.