The State of Punjab v. Surrinder Nath Goel

Dua, J.

concerned of the grant of future interest, including the rate which in our opinion would, in the circumstances of this case, be reasonable. The appellant has, in my view, not made out any case for us to adopt this procedure.

For the reasons given above this appeal is allowed in part and the order of the Court below is varied only in so far as deletion of the provision regarding costs of the arbitration proceedings from the award is concerned. In so far as the order about the grant of future interest is concerned, the order of the Court below is hereby upheld. In the circumstances of the case the parties are left to bear their own costs in this Court both with respect to the appeal and the cross-objections.

Bishan Narain, J.

BISHAN NARAIN, J.—I agree.

K. S. K.

APPELLATE CIVIL

Before Bishan Narain and I. D. Dua, JJ.

THE PUNJAB NATIONAL BANK,—*Appellant*

versus

R. B. L. BANARSI DAS AND CO.—*Respondent.*

Regular First Appeal No. No. 61 of 1954

1960

May, 24th

Banker and Customer—Customer handing over a bill for collection to bank with instructions to collect through a particular bank—Position of the latter bank qua the customer and the former bank—Indian Contract Act (IX of 1872)—Sections 211 to 214—Duty of the collecting bank to realize the amount due on the instruments entrusted to it for collection—Extent of—Liability of the collecting bank for negligence in collecting the bill—Extent of—Limitation Act (IX of 1908)—Claim of set-off in a suit—Whether governed by periods of limitation provided in the Act.

B handed over a bill for collection to bank P with instructions to realize it through bank M. P sent bill for collection to M bank, who realized it from the drawee and issued a draft in favour of P bank, which was not honoured as the financial position of bank M was weak and it closed its doors. B claimed the amount from P bank, which denied its liability.

Held, that the position of the M bank was that of the sub-agent appointed under the authority of B, but without there being any privity of contract between them. It is true that the M bank had been named by B for collecting the draft, but the instructions issued to the P bank were that on realizing the amount of the draft it was to be credited to B's account.

Held, that if a banker is dilatory in endeavouring to procure acceptance or payment or is otherwise negligent in doing the business of the agency and his customer suffers for the consequences, the banker would be liable to make it good. The collecting banker is under no special duty as such to protect the interests of the person to whom he presents a draft for acceptance or payment. It is his obligation to use all reasonable diligence in presenting for payment, though what is reasonable is always a question of fact in the circumstances of a given case. A banker is thus bound to do not only what is legally imperative upon a holder but also what is prudent in the interests of his customer. The banker must act in good faith and without negligence ; and the onus of proving the absence of negligence is on the banker. What is negligence must necessarily vary with the facts of each case, but the duty out of whih the negligence may arise is an implied duty to use due care towards the true owner of the cheque whilst collecting the cheque for the mandatory.

Held, that the collecting bank is liable to make compensation to its customer, who has entrusted the instrument to it for collection, in respect of the direct consequences of its neglect and it cannot be held liable in respect of loss or damage which is indirectly or remotely caused by such neglect. Mere mistake or error of judgment, unless it is clearly shown to be wholly unreasonable in the circumstances, can rarely—if at all—be considered to be sufficient to fix the liability on the collecting bank. A collecting bank can by no means be considered to have been negligent or to have done any thing wrong in accepting a draft from another bank who had acted as a sub-agent in collecting the bill as drafts and cheques are the usual and normal modes of modern banking business. It is for the customer to establish that the collecting bank's negligence is the direct cause of the loss sustained by him as also the extent or the quantum of such loss.

Held, that law of limitation merely bars the remedy and does not destroy or extinguish the right unless expressly so provided. There is no provision in the Indian

Limitation Act laying down any period of limitation for claims by way of set-off. Moreover the Limitation Act should be strictly construed in favour of the right to proceed.

First Appeal from the decree of the Court of Shri Parshotam Sarup, Seior Sub-Judge, Ambala, dated the 26th day of February, 1954, granting the plaintiff a decree for Rs. 2,918-0-4, only against the defendant with proportionate costs.

S. L. PURI AND RAJ KUMAR AGGARWAL, ADVOCATE, for the Appellant.

H. L. SIBAL, N. N. GOSWAMI AND S. C. SIBAL, ADVOCATES, for the Respondent.

JUDGMENT

Dua, J. DUA, J.—This appeal arises out of a suit instituted by the Punjab National Bank Limited with its registered office at 8, Underhill Road, Delhi, for the recovery of Rs. 18,046-13-10 on the basis of an overdraft account against Rai Bahadur Lala Banarsi Dass and Company Limited having their registered office at Amabla Cantonment.

According to the plaintiff's version, the defendant firm opened an overdraft account with the plaintiff-Bank and agreed to pay interest on the unsecured amount due at 9 per cent per annum. On 29th of February, 1952 a sum of Rs. 18,532-6-6 was due to the plaintiff-Bank, and, after deducting two items of Rs. 39-5-11 and Rs. 446-2-9 due from the plaintiff-Bank to the defendant-firm against other accounts, a sum of Rs. 18,046-13-10 was in the circumstances the net balance due to the plaintiff from the defendant.

In resisting the suit the defendant first raised a preliminary objection questioning the authority of the Manager of the plaintiff-Bank to file the present suit. On the merits it was pleaded that only a sum of Rs. 1,770-1-0 was due to the plaintiff-Bank from the defendant-firm after adjusting and obtaining credit for Rs. 11,951-8-9 on account of *a hundi* and railway receipt handed over to the plaintiff-Bank for collection from Messrs

Babu Ram-Mela Ram through the Union Mercantile Bank, (hereinafter described as Mercantile Bank), Nangal Township. The rate of interest was also controverted, the defendant's case being that the overdraft account was to carry interest at the rate of 4½ per cent per annum only and not 9 per cent per annum as claimed by the plaintiff. Strictly speaking the sum of Rs. 11,951-8-9 on account of the *hundi* and the railway receipt was pleaded in the nature of a claim for a set-off. In this connection it is necessary to mention that the defendants asserted that the plaintiff-Bank was guilty of extreme negligence and delay in presenting the relevant draft as also of otherwise behaving in an improper and unbusiness like manner in performing its duties as a banker.

In its replication the plaintiff-Bank denied the allegations of neglect or default on its part and pleaded that the defendants had definitely instructed the plaintiff to present the bill for collection through the Mercantile Bank, with the result that its duty and responsibility came to an end as soon as it acted in accordance with the mandate given by the defendants. It was further asserted that the plaintiff had done its utmost in trying to collect the amount, but as a result of the dilatory tactics intentionally devised by the Mercantile Bank, who was a nominee of the defendants, it had become utterly impossible for the plaintiff to recover the amount from the Mercantile Bank. There being no Branch of the plaintiff-Bank at Nangal, implied authority to employ an agent for the collection work in the present case was also relied upon, and it was expressly pleaded that such an appointed sub-agent was to be looked upon as the agent of the principal. The admissibility of the counter-claim was controverted and it was pleaded that, if so advised, the defendants could file a fresh suit, but no inquiry

The Punjab National Bank v. R. B. L. Banarsi Das and Co.,

Dua, J.

into this claim could be lawfully held in the present suit. In the alternative it was pleaded that if the Court decided to permit the defendants to urge this counter-claim, then the same was barred by limitation and was also liable to rejection for want of proper court-fee stamp. It was further averred that the transaction with respect to the draft and the railway receipt had not taken place between the parties in the same capacity, character and status as the cash credit account in question, and on this ground also the counter-claim was contended to be inadmissible in the present suit. On 11th of August, 1952 in the trial Court the defendants gave up the objection regarding the authority of the plaintiff-Bank's Manager to file the suit and stated that the main dispute in the case really centred round the unrealized sum of Rs. 11,951-8-9 for which the plaintiff-Bank was responsible because of its negligence. The counsel for the plaintiff reiterated the position that his client had diligently performed its duty as an agent and that if the amount was not recovered it was the defendant alone, who must suffer the consequences.

The pleadings of the parties gave rise to the following issues:—

(1) Did the plaintiff perform its duty as an agent properly and diligently and in accordance with the intructions of defendant in the matter of realization of the *hundi* of Rs. 11,951-8-0 ?

(2) If issue No. 1 is proved, was the plaintiff-Bank guilty of negligence or default and is, therefore, liable for the amount?

(3) To what interest and for what reason is the plaintiff-Bank entitled in the current account?

(4) Is the plaintiff-Bank entitled to the items objected to by the defendant as incidental charges or interest due in the variouus accounts?

(5) Cannot the defendant claim decision about the liability for the amount of *hundi* in the present suit?

(6) If the defendant can take up this plea, are the defendants bound to pay court-fee on the amount as a set-off.

On 10th of December, 1952 the parties seem to have agreed in the trial Court that the defendant could claim the set-off for Rs. 11,951-8-9 in the present suit, but only on payment of proper court-fee, with the result that issues Nos. 5 and 6 were accordingly disposed of on that date. After the trial of the suit the learned Senior Subordinate Judge, Ambala, granted a decree to the plaintiff-Bank for a sum of Rs. 2,918-0-4 only, holding the Bank to be guilty of negligence and default in the matter of realization of the *hundi* for a sum of Rs. 11,951-8-0. The plaintiff-Bank was held to be the agent of the defendant firm for the collection of the *hundi* and the amount of the railway receipt from the Mercantile Bank. Reliance for this finding was placed on sections 211 to 214 of the Indian Contract Act. On issue No. 3 the Court repelled the contention that there was any agreement to charge interest at 9 per cent per annum, but awarded it at the rate of 4½ per cent per annum on the ground that the Bank had previously been charging from the defendant, interest at this rate.

The plaintiff-Bank has come up to this Court on appeal against the order disallowing its claim to the extent of the amount of the *hundi* to which the defendant has been found to be entitled and the defendant-respondent has preferred cross-objections claiming proportionate costs and also

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.,

Dua, J.

questioning the calculation with respect to interest for a portion of the period. It may here be stated that the trial Court had passed the decree in favour of the plaintiff-Bank for a sum of Rs. 2,918-0-4 with proportionate costs, and it is perhaps because of this order allowing costs to the plaintiff that the defendant claims proportionate costs on Rs. 11,951-8-9 which amount had been successfully claimed by way of counter-claim or set-off.

At this stage it would be helpful to give briefly the history of the dispute in chronological order. On 5th of January, 1948, Babu Ram placed an order with Rai Bahadur Lala Banarsi Dass to despatch a wagon containing 250 bags of flour (each bag weighing 2 maunds) at the rate of Rs. 47-4-0 per bag. The railway receipt was desired to be sent through the Mercantile Bank. This letter (Exhibit P. 1) contained a postscript reminding the addressee to send the railway receipt to the Mercantile Bank, Guzar Nangal Township. On 8th of January, 1949, the railway receipt was handed over by the defendant to the Punjab National Bank, Ambala Cantonment, for collection with the direction that the same may be presented through the Mercantile Bank, Guzar Nangal, who may charge their commission only from the drawee. This amount was really intended to be credited to the cash credit account of the defendant-firm. The plaintiff's Ambala Cantonment Branch forwarded the bill in question for collection to plaintiff's Hoshiarpur Branch on 10th of January, 1949. In this communication, Babu Ram—Mela Ram, Guzar Nangal, has been described to be the drawee and it is also noted that the bill is to be collected through the Mercantile Bank Limited, which would recover its charges from the drawees. The plaintiff's Hoshiarpur Branch in turn forward-the bill to the plaintiff's Rupar Branch on 15th of

January, 1949 for disposal; a copy of this letter was of course sent to the Ambala Cantonment Branch for information, with a direction that in future correspondence may in this connection be held with the Rupar Branch. On 19th of January the Rupar Branch wrote to the Ambala Cantonment Branch that there being no means of collection at Nangal, the drawee had been informed by post; in this communication, surprisingly enough, it is not explained as to why there should have been no reference to the direction that the bill had to be presented through the Mercantile Bank which admittedly had a branch at Nangal. On 20th of January, 1949, the plaintiff's Ambala Cantonment Branch informed the Mercantile Bank, Nangal Township, that a telegram had that day been sent to the plaintiff's Rupar Branch to send the railway receipt in question to it (the Mercantile Bank) for collection. A copy of this letter was also forwarded to the plaintiff's Rupar Branch in which it was again stated that the Mercantile Bank may be instructed to charge their commission from the drawees. It appears that on 24th of January, 1949, Babu Ram-Mela Ram depot-holders, Nangal Township, paid the money on account of the railway receipt to the Mercantile Bank. On 1st of February, 1949, the plaintiff's Rupar Branch inquired from the Mercantile Bank about the fate of the bill in question for Rs. 11,951-8-9; a copy of this communication was also sent to the Ambala Cantonment Branch. On 2nd of February, 1949, the Merchantile Bank informed the plaintiff's Rupar Branch that the proceeds of the B/C (bill for collection) had been collected and that the proceeds thereof had been sent to the latter through draft No. 61/49, dated 1st of February, 1949, drawn on the Mercantile Bank, Hoshiarpur Branch. On 7th of February, 1949, the plaintiff's Rupar Branch seems to have written to the Mercantile Bank

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.,

Dua, J.

inquiring, with a certain amount of surprise, as to why the draft said to have been sent had not so far been received by them; immediate attention to the matter was requested and a duplicate draft demanded. On 14th of February, 1949, the Rupar Branch wrote to the Ambala Cantonment Branch stating all the facts and inquiring if the draft said to have been sent by the Mercantile Bank had been received direct by the Ambala Cantonment Branch. A telegram was also sent to the Mercantile Bank to expedite the matter. On 15th of February, 1949, the Mercentile Bank sent the following telegram to the plaintiff's Rupar Branch :—

"Sending duplicate draft."

Curiously enough, three days later, on 18th of February, 1949, the Mercantile Bank wrote to the Rupar Branch expressing its surprise on the non-receipt of the draft No. 61/49 and demanding an indemnity bond to enable it to despatch the duplicate draft. On 21st of February, 1949, the Rupar Branch wrote a very strong letter to the Mercantile Bank protesting against the latter's tactics and also against the demand of an indemnity bond. It is desirable here to reproduce the following sentences contained in this letter because the respondent has sought to deduce *mala fides* on the part of the Rupar Branch from it:—

> "If we were not prompted by a sincere desire not to bring into trouble a sister banking institution some action would have been taken already. We have ample evidence on our record to convince those who may have to be convinced that you have tried to evade and hold up payment for all this time by devious means. We will, therefore, request you in your own interest to send us the draft in lieu of our bill by return of post. We hope you will appreciate our helpful attitude.

If the draft is not received by return of post appropriate action will be taken against you."

I may mention at this stage that the respondent has been vehement in the suggestion that by the 21st of February, 1949, the plaintiff as a reasonable person must or at least should have come to the conclusion that some drastic action was absolutely necessary for realising the amount from the Mercantile Bank. It is emphasised that difficulties in the way of the plaintiff-Bank in performing its duties and functions as agent, must have been obvious to it at this stage. On 28th of February, 1949, the above letter is acknowledged by the Mercantile Bank and it is stated that the matter had been referred to their own District Manager. In this letter it is suggested that the draft had perhaps been mislaid in transit by the postal authorities. It appears that on the same day, i.e., 28th of February, 1949, the Ambala Cantonment Branch of the plaintiff-Bank, also inquired from the Mercantile Bank as to what steps the latter had taken in the matter, and payment of the bill was demanded within a week. On 3rd of March, 1949, the plaintiff-Bank's Rupar Branch sent their Accountant Shri Krishan Gopal with stamp paper to execute an indemnity bond, as insisted upon by the Mercantile Bank, and to receive the necessary duplicate draft. Finally on 4th of March, 1949, a duplicate draft for Rs. 11,951-8-9, was issued by the Mercentile Bank, Nangal Township, on its Hoshiarpur Branch in favour of the plaintiff-Bank. On 7th of March, 1949, the Rupar Branch of the plaintiff Bank sent the draft for Rs. 11,951-8-9, to its Hoshiarpur Branch for collection and credit of proceeds to their Head Office account on realisation. On 9th March, 1949, the Hoshiarpur Branch wrote back to the plaintiff's Rupar Branch stating that the bill

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.,

Dua, J.

sent by them remained unpaid because the Union Mercantile Bank, Hoshiarpur Branch had directed that the bill be presented again after four days. On 12th March, the Rupar Branch again forwarded the same bill to their Hoshiarpur Branch for collection and credit of the proceeds to the Head Office account on realisation. It again seems to have been returned on 19th of March, 1949, on the ground that instructions on the face of the draft required signatures of the issuing Branch. It may be noticed that on the 18th March, 1949, the plaintiff's Hoshiarpur Branch had also sent a reminder to their Rupar Branch in respect of the bill in question. On 24th March, 1949, the plaintiff's Rupar Branch wrote to their Ambala Cantonment Branch stating that the Union Mercantile Bank had been adopting thoroughly unjustifiable and dilatory tactics and was trying to dodge payment. After recounting the steps taken on their side in deputing the Accountant for securing payment of the bill, the view was expressed that the Union Mercantile Bank was either in difficulties or was somehow gaining time on one excuse or the other. The draft was in those circumstances sent to the Ambala Cantonment Branch, for necessary action in the matter. On 20th March, 1949, the Ambala Cantonment Branch returned the draft to the Rupar Branch along with the objection memos, which had also been forwarded to them with the letter of the 24th March, instructing the Rupar Branch to get the objections removed from the issuing office by deputing a member of the staff and then to collect the bill through the Hoshiarpur Branch. A copy of this letter also seems to have been sent to Rai Bahadur Lala Benarsi Dass, for information. On 1st April, 1949, the Mercantile Bank, Nangal, wrote to the plaintiff's Rupar Branch acknowledging receipt, through their Accountant, of the draft for correc

tions and intimating that the draft would be duly correced and despatched under a registered cover to the Bank's Rupar address. It is also stated in this letter that the bill so corrected may then be presened at the drawee office which, the Nangal Branch was sure, would honour it.

On 4th April, the plaintiff's Rupar Branch, again wrote to its Ambala Contonment Branch enclosing the draft and the letter obtained from the Nangal Branch of the Mercantile Bank and desiring the plaintiff's, Ambala Cantonment Branch to arrange to collect the draft as best as it thought fit. On 19th April, the plaintiff's Ambala Cantonment Branch sent the draft in question to its Hoshiarpur Branch for collection and credit to the Head Office account on realisation. It was expressly stated in this letter that the drawee office had been repeatedly refusing payment on one pretext or the other. The Manager of the plaintiff's Hoshiarpur Branch, was by this letter requested to take personal interest and get the draft encashed at an early date. Stress was particularly laid that this draft was the only document against the Mercantile Bank and should in no case be lost. On 21st April, 1949, the plaintiff's Hoshiarpur Branch again wrote to the Ambala Cantonment Branch stating that the bill in question still remained unpaid because the doors of the drawee Bank were closed. It was further intimated that the Bank concerned seemed to be in financial difficulties and, therefore, it seldom made payment to its customers. It was, therefore, suggested that presentment of the cheque in question may be deferred. On 23rd of April, 1949, the Ambala Cantonment Branch again enquired from their Hoshiarpur Branch as to what steps were being taken by the Mercantile Bank for making further payments. On 4th May, the defendant wrote to the plaintiff's, Ambala Cantonment Branch acknowledging receipt of the Bank's letters, dated

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.

Dua, J.

23rd April, 1949, and stating that the Bank was to recover cash against the railway receipt and the *hundi*, dated 8th January, 1949, and that the Bank having accepted the draft in its favour against the said railway receipt and *hundi*, the defendants could not be held responsible for it. It was further claimed that either the amount of the demand draft should be credited to their account or the *hundi* and the railway receipt should be returned to them. With these remarks draft No. 302, dated 4th March, 1949, for Rs. 11,951-8-9, on the Mercantile Bank, Hoshiarpur, was returned, the defendants according to them, having nothing to do with it. From this letter it apears that the duplicate draft had in all probability been sent by the plaintiff-Bank to the defendant with a letter giving the relevant details. On 14th May, the plaintiff's Ambala Cantonment Branch wrote to the defendant acknowledging the letter of the 4th May, and stating that whatever the plaintiff-Bank had done was strictly in accordance with the defendants' instructions and that they (the plaintiffs) could not have refused to accept a draft from the Mercantile Bank. It was, however, reiterated that the plaintiff-Bank was still trying to get the draft encashed, which was lying unpaid entirely on the defendant's risk and responsibility. It may at this stage be stated that on 12th May, the plaintiff's Hoshiarpur Branch had written to their Ambala Cantonment Branch (per Exhibit P. 23) that the Union Mercentile Bank, Limited, was not making regular payments and that its doors were always found closed and the cheques were returned with the objections such as "payment countermanded for 10 days or so". It was expressly stated in it that there was no hope of the payment in the near future and that the matter had already been referred to the Head Office to issue instructions to the branches not to accept any B.C. or D.D.

on the said Bank. On 6th June, 1949, the plaintiff-Bank advised the defendant with respect to the position of the latter's cash credit and current accounts and demanded further security to cover the deficit in the account.

The above resume gives all the correspondence relevant for our purposes and it is unnecessary to refer to any future correspondence. The question which arises for consideration is as to how far the plaintiff-Bank is negligent in discharging its duties as a collecting Bank on the facts and circumstances of the present case and whether or not the defendant's claim with respect to the sum of Rs. 11,951-8-9, against the plaintiff-Bank is justified. It is equally unncessary, in view of the correspondence given above, to refer in detail to the oral evidence because the position as it emerges from the various letters hardly needs any clarification or explanation.

Mr. Puri on behalf of the plaintiff has placed reliance on three decided cases in support of his contention that the defendant having nominated the Union Mercantile Bank to be the agency through which the plaintiff-Bank was to collect the amount of the railway receipt and the *hundi*, any misconduct or dishonest behaviour on the part of the Union Mercantile Bank cannot constitute his client's negligence and thus cannot impose on the plaintiff-Bank the liability for non-realisation of the amount of the *hundi*. *De Bussche* v. *Alt.* (1), is the first authority on which the counsel has placed reliance. Particular passage relied upon occurs at page 310. It is laid down there:—

> "As a general rule, no doubt, the maxim '*delegatus non potest delegare*' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal

(1) (1878) 8 Ch. D. 286

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.,

Dua, J.

and a third person ; but this maxim when analyzed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed 'a sub-agent' or 'substitute' (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority

should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, an is duly exercised, privity of contract arises between the pricipal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been apointed agent by the principal himself."

The second case is *The Central Bank of India Limited* v. *Firm Rur Chand-Kura Mal* (1), in which the principle laid down in the first case was approved by a Division Bench of this Court.

Chowdhury T. C. and Brothers v. *Girindra Mohan Neogi* (2), is the third decision and in this case also *De Bussche's case,* (3) among others, was relied upon for the following observations:—

"The issue depends upon whether the defendant-Bank on behalf of the plaintiffs and the Khulna Bank agreed that the Khulna Bank should act at Khulna as the plaintiffs' agent for the purpose of collecting the bills or, in other words, whether the defendant-Bank created privity of contract between the plaintiffs and the Khulna Bank. In my opinion, that is the true test to determine whether the person appointed by an agent authorised in that behalf to perform part of the business of the agency is a substituted agent of the principal or the sub-agent of the agent, and the test to be applied is the same

(1) 1958 P.L.R. 235
(2) A.I.R. 1930 Cal. 10
(3) (1878) 8 Ch. D. 286

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.

Dua, J.

whether the case falls within section 194 or whether, as in the present case, the person so appointed is the nominee of the principal although there is a difference in the obligation undertaken by the agent, for section 195 applies to a case falling within section 194, while in cases where the substituted agent is the nominee of the principal, the agent is not concerned with the character or efficiency of the person so appointed, and his obligation quoad the part of the business of the agency entrusted to the substituted agent ceases if and so soon as privity of contract has been created between the substituted agent and the principal."

After applying the above test to the facts of the case before him the learned Judge proceeded thus—

"As I apprehend the facts, in endeavouring to carry out the collection of the bills at Khulna, the Khulna Bank was not acting under the control of the defendant-Bank, for, so far as the collection at Khulna was concerned, the defendant-Bank was acting under the directions of the plaintiffs, who throughout took charge of the transaction The defendant-Bank, in my opinion, was merely the conduit pipe through which the plaintiffs communicated their instructions to the Khulna Bank, and, inasmuch as the defendant-Bank invariably, I think, forwarded to the Khulna Bank the communications which they received from the plaintiffs, it is clear that the Khulna Bank was fully aware

that the instructions which the defendant-Bank forwarded to them proceeded from the plaintiffs, and not from the defendant-Bank."

In so far as the principle laid down by Thesiger L. J. *in De Bussche' case* (1) at page 310 of the report is concerned, this has since received the approval of the Supreme Court in *Union of India* v. *Amar Singh* (2), (decided on 28th of October, 1959). The question, however, is whether on applying this test the Mercantile Bank has become the agent of the plaintiff before us or whether it is really a sub-agent of the defendant-respondent.

On behalf of the respondent it has been urged that in the case of the *Central Bank of India* (3) the question of the agent's negligence was not considered, as on the admission at the Bar in that case, this question did not arise on the findings given by the Court. Besides, in that case, according to Mr. Sibal, instructions had been taken as laid down in section 214 of the Indian Contract Act. In the case of *Chowdhury T. C. and Brothers* (4) too, according to the respondent, information had been given to the principal and, therefore, the question of the liability of the original agent did not arise. While commenting on this decision the respondent has contended that in the present case the Mercantile Bank could not possibly have paid the amount of the draft to the defendant-respondent direct, there being no privity of contract—express or implied—between them.

Reference was then made to section 182 of the Indian Contract Act which defines "agent" and "principal", the argument being that the

(1) (1878) 8 Ch. D. 286
(2) A.I.R. 1960 S.C. 233
(3) 1958 P.L.R. 235
(4) A.I.R. 1930 Cal, 10

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.

Dua, J.

plaintiff-Bank is clearly the agent of the defendant-respondent. A passing reference was also made to Halsbury's Laws of England, Third Edition, Volume I, para 405, where three classes of sub agents have been thus described.

"(i) those employed without the authority, express or implied, of the principal, by whose acts the principal is not bound;

(ii) those employed with the express or implied authority of the principal, but between whom and the principal there is no privity of contract; and

(iii) those employed with the principal's authority, between whom and the principal there is privity of contract, and a direct relationship of principal and agent is, accordingly, established."

It is submitted that the present case falls in category (ii); the case of the appellant, on the other hand, being that it falls under category (iii). I need hardly refer to the provisions of section 212 of the Indian Contract Act because it is not disputed that an agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill, and also that the agent is always bound to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

In my opinion, after considering the evidence on the record, particularly the correspondence which passed between the parties, the position of the Mercantile Bank is that of the sub-agent appointed under the authority of the defendant firm, but without there being any privity of contract between them. The question which arises

for consideration, therefore, is how far is the Punjab National Bank guilty of negligence and what is the extent of its liability to the defendant-firm for the non-realization of the amount of the draft in question. It has been contended on behalf of the respondent that as provided in section 214 of the Indian Contract Act it was the duty of the Punjab National Bank, as an agent, in case of difficulty, to use all reasonable diligence in communicating with his client, and in seeking to obtain their instructions. In this connection he has emphasised that as soon as the Punjab National Bank realized that the Mercantile Bank was postponing payment on frivolous pretexts, it should have immediately informed the defendant-firm and sought instructions from it. On the other hand Mr. Puri has contended that the Mercantile Bank being the choice of the defendant-firm for the purpose of realizing the amount of the draft from Messrs Babu Ram—Mela Ram, it was their duty both to realize the amount from Messrs Babu Ram-Mela Ram and to pay it to the Punjab National Bank for being credited to the account of Banarsi Dass and Company Limited. He has further contended that, in any case, the Mercantile Bank being financially unsound from the very beginning of its appointment as agent for the collection of the draft in question, even if the Punjab National Bank had informed Banarsi Dass and Company, nothing could possibly have been realized from the Mercantile Bank and, therefore, no loss has accrued to the firm directly on account of the Bank's failure to inform the former and to seek its directions. Mr. Sibal, however, argues that the financial position of the Mercantile Bank is wholly irrelevant and that the direct consequences of the Bank having not informed the firm of the delaying tactics of the Mercantile Bank have directly resulted in the loss of the amount of the draft to his clients.

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.

Dua, J.

He has in this connection laid great emphasis on the want of diligence shown by the Ambala Cantonment, Hoshiarpur and Rupar Branches of the Punjab National Bank in dealing with the matter of presentation of the draft which in the circumstances called for greater promptitude than the evidence discloses. He has also stressed that, even, to begin with, the Punjab National Bank should not have accepted the draft from the Mercantile Bank, but should have insisted on cash payment. In any case, it is contended, that once it was made to appear that the Mercantile Bank did not mean business and that it was merely gaining time and delaying the payment of the draft on frivolous grounds, the Punjab National Bank should not have accepted a duplicate or a substituted draft on the second occasion; want of proper scrutiny while accepting the duplicate draft has also been adversely commented upon. At least, so argues the counsel, Banarsi Dass and Company should have immediately been informed by the Bank when unreasonable delay had been caused by the Mercantile Bank in making the payment and when its *bona fides* were, or, at any rate, should have been, suspected.

In my opinion the Punjab National Bank is undoubtedly guilty of negligence in dealing with the business of collecting the draft from Messrs Babu Ram—Mela Ram through the Mercantile Bank. It is true that the Mercantile Bank, Nangal, had been named by Banarsi Dass and Company for collecting the draft. But the instructions issued to the Punjab National Bank were that on realizing the amount of the draft it was to be credited to the Company's account. It appears to me fairly well settled that if a banker is dilatory in endeavouring to procure acceptance or payment

or is otherwise negligent in doing the business of the agency and his customer suffers for the consequences, the banker would be liable to make it good. It is equally well-established that the collecting banker is under no special duty as such to protect the interests of the person to whom he presents a draft for acceptance or payment. It is his obligation to use all reasonable diligence in presenting for payment, though what is reasonable is always a question of fact in the circumstances of a given case. A banker is thus bound to do not only what is legally imperative upon a holder, but also what is prudent in the interests of his customer. The banker must act in good faith and without negligence; and the onus of proving the absence of negligence is on the banker. What is negligence must necessarily vary with the facts of each case, but the duty out of which the negligence may arise in an implied duty to use due care towards the true owner of the cheque whilst collecting the cheque for the mandatory.

I now come to the plea of limitation. Mr. Puri has contended that the claim is barred by time under article 90 of the Indian Limitation Act. According to the counsel, the terminus a *qua* was the date when the neglect or misconduct became known to the plaintiff, and this, according to him, would either be 30th of March, 1949 or 21st of April, 1949; in any case he submits that it could by no means be after 4th of May, 1949, when a letter was sent by Messrs Banarsi Dass and Company to the Punjab National Bank, Ambala Cantonment. The claim being barred by time on 26th of May, 1952, when the written statement was filed by Messrs Banarsi Dass and Company, the counsel submits, the defendant could not ask for adjustment of the amount of the draft. In support of his contention reference has been made to *Saw*

The Punjab National Bank v. R. B. L. Banarsi Das and Co.

Dua, J.

Hla Pru v. *S. S. Halkar etc.* (1), in which a suit for damages against an advocate by his client for the former's negligence was held to be governed by article 90. *Maharani Janki Koer* v. *Mahabir Prasad* (2), is another decision in which in a suit by a principal against his agent for neglect in the discharge of duties article 90 was applied and the *terminus a quo* was the date when the agent's neglect became known to the principal, and not when the principal came to know that there was sufficient cause for a good case being run against the agent. In my opinion these decisions do not touch the real point which arises in the present case, because here we have to see if there is any period prescribed for a claim of set-off. It is well established that law of limitation merely bars the remedy, but does not destroy or extinguish the right unless expressly so provided. There is no provision laying down limitation for set-off with the result that article 90 would not be applicable to the case. There is also authority for the view that the Limitation Act should be strictly construed in favour of the right to proceed. I, therefore, unhesitatingly reject this contention.

The question which next arises for consideration is that of the extent of the liability of the Bank for the consequences of its negligence. It is common ground that it has to make compensation to the defendant only in respect of the direct consequences of its neglect and that it cannot be held liable in respect of loss or damage which is indirectly or remotely caused by such neglect. Mr. Puri has contended that the financial position of the Mercantile Bank was so weak that it was not at all possible to realize the amount of the draft from it, whereas Mr. Sibal has contended that the

(1) A.I.R. 1932 Rangoon I.

(2) 25 I.C. 706

financial position of the Mercantile Bank is wholly irrelevant. He has, in the alternative, contended that if his clients had been informed in proper time, they would perhaps have taken some drastic steps by putting pressure on the Mercantile Bank and would even have filed suits and secured some interlocutory orders for safeguarding their interests. In this connection Mr. Sibal has also referred to Illustrations (a) and (b) under section 212 of the Indian Contract Act. These Illustrations, however, are not of much assistance, because the facts of both of them clearly show that the consequences which arose from the breaches there were direct. The contention on behalf of the Bank in the present case is that the non-recovery of the amount is not the direct consequence of the Bank not informing the defendant or in not presenting the draft as promptly as is contended by Mr. Sibal. In this connetion it is instructive to refer to the evidence of Shri B. P. Roy, Registrar, Joint Stock Companies, Bangal. It is clear from this evidence that the Mercantile Bank was incorporated on 18th of March, 1944 and that the name of this Bank was struck off as being a defunet company on 21st of April, 1950. The last papers received in the Registrar's office were about the change of the Bank's office from Canning Street, Calcutta, to Synagogue Street, Calcutta, and the name of the Bank was struck off when they found that there was no information traceable about it. He has also stated that action was taken against the Bank on 5th of May, 1948 before the Chief Presidency Magistrate, but as the Directors were not traceable, it was filed on 31st August, 1948. From this evidence the inference is irresistible that whatever kind of information the Bank would have given to the defendant, it is most unlikely that any substantial amount could be

The Punjab National Bank
v.
R. B. L. Banarsi Das and Co.

Dua, J.

recovered on account of this draft. It is true that Khazan Singh D.W 4, who is the landlord of the building in which the Mercantile Bank functioned at Nangal from December, 1948 to 6th of July, 1949, received the amount of his rent which had been fixed at Rs. 100 per mensem, but even he could not realize the whole of his balance of deposit from this Bank; a sum of Rs. 300 or Rs. 400 due to him still remained unpaid. This witness has also deposed that on 7th July, 1949 the plaintiff-Bank opened their branch in this very building at Nangal. He is, however, not sure if the Mercantile Bank people removed all their goods from the building. Tek Chand, D.W., 5 has also stated in his evidence that the Mercantile Bank people used to harass their customers and that the Manager of the Hoshiarpur Branch of this Bank and his brother had actually been arrested. The Bank also defaulted in the payment of the salaries of its peons. This witness is the landlord of the building leased out to the Hoshiarpur Branch of the Mercantile Bank. From this evidence it appears to me that the non-recovery of the amount of draft can hardly be described as a direct consequence of the negligence of the Punjab National Bank.

It has been contended on behalf of the respondent that the plaintiff-Bank should not have accepted a draft, but should have in the very beginning insisted on cash payment and that omission to do so is the direct cause of the loss. This contention is in my view misconceived. Drafts and cheques are the usual and normal modes of modern banking business and the plaintiff-Bank can by no means be considered to have been negligent or to have done anything wrong in accepting the draft in question. Nothing has been shown to us as to why the plaintiff-Bank should have

adopted the procedure of insisting on cash payment when the defendant-firm had not given any such instructions specifically. It is then contended that at least on the second occasion, when a duplicate draft was given, cash payment should have been insisted upon. Here again it is a little difficult to agree with the respondent. Unless it can be positively shown that the plaintiff-Bank must have been convinced that without adopting the special procedure of insisting on cash payment from the Mercantile Bank the draft could not have been honoured at all, the plaintiff-Bank cannot in my opinion, be considered to be in breach of its obligations or duties as an agent merely by its omission to insist on cash payment. The subsequent events cannot justifiably be taken into account while considering the question of what the plaintiff-Bank should have done at the time when the drafts were received from Mercantile Bank. Mere mistake or error of judgment, unless it is clearly shown to be wholly unreasonable in the circumstances, can rarely—if at all—be considered to be sufficient to fix the liability on the plaintiff-Bank. In my view it was clearly for the defendant, on the facts and circumstances disclosed on the present record, to establish that any earlier information would have enabled them to realize the amount of the draft. That the plaintiff-Bank's negligence is the direct cause of the loss sustained by the defendant, as also the extent or the quantum of such loss, has, on the peculiar facts of this case, to be established by the defendant-firm, in doing which, in my opinion, they have not succeeded.

In the light of the above discussion, I am constrained to hold that the plaintiff-Bank is entitled to a decree for a further sum of Rs. 11,951-8-9, but as the plaintiff-Bank has been negligent, the parties must bear their own costs throughout. In so

The Punjab National Bank v. R. B. L. Banarsi Das and Co.,

Dua, J.

far as the claim with respect to the interest is concerned, the appellant has said nothing substantial against the grant of interest at 4½ per cent per annum instead of at 9 per cent per annum. Interest thus can only be allowed at 4½ per cent per annum, which has been determined by the lower Court to be Rs. 1,147-15-4.

In view of the above findings, the cross-objections with respect to claim of proportionate costs must obviously fail; in so far as the ground with respect to interest is concerned, here again no, arguments were addressed by the respondent showing as to on which items and for which period interest at 9 per cent per annum has been calculated by the Court below. The cross-objections are thus also dismissed, but with no order as to costs.

In conclusion, therefore, the appeal is allowed and the plaintiff is granted a decree for Rs. 16,017-0-5, the parties bearing their own costs throughout.

DUA, J.—I agree.

B.R.T.

REVISIONAL CRIMINAL

Before Bishan Narain and Inder Dev Dua, JJ.

PIARA SINGH AND OTHERS,—*Petitioners*

versus

THE STATE,—*Respondent.*

Criminal Revision No. 1339 of 1959.

1960

May, 24th

Punjab Instruments (Control of Noises) Act (XXXVI of 1956)—Section 3—"premises"—meaning of—Whether