

## Vastulal vs Pareek Commercial Bank on 27 August, 1964

Equivalent citations: [1965]35COMPCAS133(SC)

**Bench: P.B. Gajendragadkar, J.C. Shah, N. Rajagopala Ayyangar**

### JUDGMENT

Shah, J.

1. The appellant, Vastulal Pareek--hereinafter referred to as " Vastulal "--started in 1921 at Bikaner a banking business in the name and style of the Pareek Commercial Bank. In 1943 a public limited company was registered under the Bikaner Companies Act called the Pareek Commercial Bank Ltd.--hereinafter called " the bank "--and all the assets and liabilities of the Pareek Commercial Bank were transferred to that public limited company. Under the articles of association of the bank general management of the business was, subject to the control and supervision of the directors, vested in Vastulal who was appointed chairman of the bank. In an application under the Indian Companies Act, 1913, submitted in February, 1952, before the High Court of Rajasthan (which at the material time had acquired, on account of political changes, jurisdiction over the territory of the former Indian State of Bikaner) by one of the depositors of the bank, the High Court passed an order for compulsory winding up and appointed an official liquidator to wind up the affairs of the bank. On examining the books of account of the bank, the liquidator found that in the "cash credit accounts " of six stock brokers stood diverse amounts which aggregated to Rs, 66,821. These amounts had been transferred to the account of those brokers from the "sundries register" of the bank. It was also found that payments had been made in the accounts of those stock brokers in different banks on instructions given by Vastulal on behalf of the bank. In the directors' report dated December 31, 1950, under the caption " Loans, advances, cash credits and overdrafts ", certain amounts were collectively described as " debts considered good for which the bank held no other security than the debtor's personal security ", that the amount of Rs. 66,821 was the balance due from diverse " parties through whom shares were purchased and sold, but not transacted through share account ", and that the same was " unverified owing to the lack of information ". The explanation given by Vastulal in his public examination under Section 450 of the Banking Companies Act, 1949, about the transfer of amounts to the stock brokers was found unsatisfactory. On enquiry the stock brokers informed the liquidator that the items were credited by them to the account of M/s. B. R. Pareek & Sons Ltd.--a private concern of which Vastulal was the managing director--and the amounts were utilised towards discharge of the liability for payment of losses of that concern in its dealings in shares which had been carried on through them. The liquidator submitted three petitions to the company judge of the High Court of Rajasthan at Jodhpur under Section 235 of the Indian Companies Act (7 of 1913) and Section 45H of the Banking Companies Act (10 of 1949), for directions against Vastulal and other directors of the bank that they be ordered to restore the amounts belonging to the bank which had been transferred to the stock brokers and for

orders for assessment of damages. It was averred in the petitions that Vastulal had done speculative business in buying and selling shares and securities in the name of M/s. B. R. Pareek & Sons Ltd. through different stock brokers and had suffered heavy losses and that towards payment of or as advance in connection with his personal and private transactions and in any case not in respect of transactions of the bank had got paid large amounts of money through the Imperial Bank of India at Bombay to the brokers and had debited or allowed to be debited the said amounts in the " sundries register " to the account of the brokers and had thereby gained advantage for himself and on that account was guilty of misfeasance, malfeasance and non-feasance. It was also averred that the other directors had rendered themselves liable under Section 235 of the Indian Companies Act, 1913, in that, being directors of the bank, they either abetted or connived at the conduct of Vastulal in misapplying the funds belonging to the bank towards payment of his personal losses. The claim against those directors has been dismissed by the High Court and nothing more need be said in that behalf.

2. The company judge rejected the plea raised by Vastulal and passed orders in the three petitions that Vastulal do pay to the bank three sums, Rs. 700, Rs. 8,500 and Rs. 24,846-11-0 with interest on each of those sums at six per cent. per annum simple up to the date of realization. Against those orders three appeals were preferred to the High Court being Appeals Nos. 5, 6 and 7 of 1960. Appeal No. 5 of 1960 was held not maintainable and was accordingly dismissed. Appeals Nos. 6 and 7 of 1960 were heard on the merits and were ultimately dismissed by the High Court. Against the orders passed by the High Court these two appeals have been preferred with special leave.

3. Appeal No. 484 of 1962 arises out of the order made in Company Case No. 176 of 1957 for payment of Rs. 8,500 which was the amount transferred by Vastulal to M/s. Naraindas Aidan, stock brokers of Bombay, and Appeal No. 485 of 1962 arises out of the order passed in Company Case No. 177 of 1957 for payment of Rs. 24,846-11-0, being the amounts of money and the value of 19 shares of the Kohinoor Mills Ltd. transferred to M/s. S. Ramdas also stock brokers of Bombay. In the " sundries register " of the bank the following are the relevant entries in the accounts of M/s. Naraindas Aidan and M/s. S. Ramdas :

"Account of M/s. Naraindas Aidan		page 75
9-12-49	To amount paid by Bank of India, Bombay, on 13-12-49	Dr. 3,500
6-2-50	To amount paid by Imperial Bank of India, Bombay, on 3-2-50	Dr. 5,000
6-12-51	By amount transferred to cash credit account	Cr. 8,500"
"Account of M/s. S. Ramdas		page 76

23-12-49 To cash paid by Imperial Bank of India, Bombay, on 19-12-49 Dr. 10,000 28-1-50 To cash paid by Imperial Bank of India, Bombay, on 7-1-50 Dr. 2,500 6-5-50 To cash paid by Imperial Bank of India on 22-2-50 Dr. 1,000 6-12-51 By amount transferred to cash credit account Cr. 18,500"

4. Apart from the entries relating to Rs. 18,500 there was an entry relating to transfer by Vastulal to Messrs. S. Ramdas of 19 shares of the Kohinoor Mills Ltd. which belonged to the bank. The market value of those shares at the date of the transfer was Rs. 6,346-11-0. The balance outstanding against Messrs. S. Ramdas in the cash credit account thus stood at Rs. 24,846-11-0.

5. We may deal with the cases relating to the amounts transferred to the two brokers separately. First, taking up the case relating to the amount of Rs. 24,846-11-0 transferred to Messrs. S. Ramdas, it appears from the record that Vastulal did not dispute that Messrs. B. R. Pareek & Sons Ltd. is his personal concern of which he is the managing agent. He also did not dispute that items which were credited in the account of Messrs. S. Ramdas were credited on his instructions and so were the 19 shares of the Kohinoor Mills Ltd. He admitted that all these amounts and the shares were the property of the bank and that the 19 shares of the Kohinoor Mills Ltd. had been delivered to the stock brokers by him in his capacity as chairman of the bank. The only plea raised by the appellant was that the payments of the amounts made and the delivery of the shares were for the purposes of the bank and that he did not authorise the stock brokers to utilise the amounts and the value of the shares towards any of his personal losses that may have resulted in the transactions of sale and purchase of shares on behalf of Messrs. B. R. Pareek & Sons Ltd. He submitted that if the share brokers appropriated the various sums to losses incurred in his personal dealings, they acted without authority and they were liable to make good the amounts to the bank, but the amounts so appropriated could not be recovered by the liquidator from him. With regard to the amount of Rs. 24,846-11-0 the case of Vastulal was that the bank had agreed to purchase debentures of the face value of Rs. 50,000 of the Calcutta Electric Supply Company Ltd. and to put the brokers in possession of the funds, Rs. 18,500 were transferred through the Imperial Bank of India and 19 shares of the Kohinoor Mills Ltd. were delivered for sale. Vastulal stated in his evidence that Messrs. S. Ramdas were directed to purchase for the bank debentures of the Calcutta Electric Supply Company Ltd. some time in the last week of January, 1950, and the order was cancelled on February 14, 1950. This story of Vastulal was disbelieved by the High Court. Vastulal did not produce the books of account relating to his share transactions in the name of Messrs. B. R. Pareek & Sons Ltd. He also did not produce the correspondence with the stock brokers in which receipt of the amounts and appropriation thereof was intimated by the brokers. It is true that Ramdas had admitted in paragraph 9 of his statement dated October 15, 1955, that an order for the purchase of debentures of the Calcutta Electric Supply Company was placed by the bank in the last week of January, 1950, and that order was subsequently cancelled on February 14, 1950. He had however admitted in that statement that the bank had no payment towards the debentures because " they had not come in the market" till then and no bill was presented to the bank for the amount required for purchasing the debentures. The story of Vastulal is inconsistent with the entries made in the books of account of the bank. The amount of Rs. 18,500 is the aggregate of four items : Rs. 10,000 paid on December 19, 1949; Rs. 2,500 paid on February 6, 1950 ; Rs. 5,000 paid on January 7, 1950, and Rs. 1,000 paid on February 20, 1950 ; out of these Rs. 17,500 were transmitted before any instructions--even according to the story of Vastulal--had been given about the purchase of debentures of the Calcutta Electric Supply Co. Ltd. The last entry of Rs. 1,000 is dated February 20, 1950, and on the story of Vastulal before that date the order for the debentures had been cancelled. Admittedly, Messrs. S. Ramdas had credited the amounts received by them in the account of Messrs. B. R. Pareek & Sons Ltd. Their ledger was produced to prove the transactions which were carried on in the name of Messrs. B. R. Pareek & Sons Ltd. and in that account book all the amounts in dispute are credited as received through the Imperial Bank of India. In that account were also credited the sale proceeds of 19 shares of the Kohinoor Mills Ltd., and after crediting the amounts, Rs. 891-10-6 remained outstanding against Messrs. B. R. Pareek & Sons Ltd. in the account books of Messrs. S. Ramdas. The letters written by Messrs. S. Ramdas advising appropriation of the amounts received have not

been produced. Nor were the books of account of Messrs. B. R. Pareek & Sons Ltd. produced. Two letters--which should normally be in the custody of the bank but were produced by Vastulal--were sought to be relied upon in support of the case that the amounts transferred to Messrs. S. Ramdas were in respect of the order for the purchase of debentures of the Calcutta Electric Supply Co. Ltd. But even these letters do not support his case. The letter dated January 25, 1950, merely acknowledged the receipt of the order for the purchase of debentures worth Rs. 50,000 but there is no reference to any sums transferred as advance payment on that account. Admittedly, Rs. 17,500 had been received by Messrs. S. Ramdas before the date of this letter, and if that amount was to be appropriated for the purchase of debentures, some indication in that behalf may have been found recited in the letter. The second letter which is dated February 14, 1950, relates to the cancellation of the order, but even that letter refers to no transfer of funds for the purchase of debentures, nor does it make any reference to the appropriation of the funds already transferred to the brokers for the alleged specific purpose of purchasing the debentures. The books of account of the bank show that it was not the practice of the bank to make advance payment for purchase of stocks, shares or securities : it was only after the stocks were purchased and the bill was submitted that payments were made. No rational explanation has been given by Vastulal as to why a departure was made in respect of this particular transaction for purchase of debentures. The case of Vastulal that the amounts appropriated by Messrs. S. Ramdas towards losses in the account of Messrs. B. R. Pareek & Sons Ltd. were directed to be appropriated for purchase of debentures of the Calcutta Electric Supply Co. Ltd. is not supported by any documentary evidence in the custody of the bank.

6. It was urged by counsel for Vastulal that the entries in the books of account of Messrs. S. Ramdas were not admissible under Section 34 of the Evidence Act. But the question as to the admissibility of the books of account was not raised before the company judge. The question whether evidence which is otherwise admissible in law is duly proved and admitted can only be raised at the time when that evidence is tendered and admitted and not at the stage of appeal. It was in this case contended for the first time in appeal that the entries in the books of account of Messrs. S. Ramdas were not proved by the person who made those entries. The learned company judge was, it appears, of the opinion that the entries were duly proved. No objection was raised before him that the entries in the books of account were not proved. It is a settled rule that when evidence which in law is admissible and relevant is admitted in the court of trial without objection, no plea of improper proof will be permitted to be raised in appeal. The entries having been tendered in evidence without objection, the plea raised by counsel was rightly not entertained by the High Court in appeal.

7. Counsel for the appellant also submitted that the appellant was misled into believing that when enquiry was held under Section 45-H of the Banking Companies Act the company judge had only to ascertain whether there was a prima facie case made out by the liquidator and that, if such a case was made out, there would be a full enquiry into the plea raised by the appellant, and that is why the appellant did not lead evidence which was in his possession in support of his case. No such argument was advanced before the appeal court and for very good reasons. Under Section 45H of the Banking Companies Act, in so far as it is material, it is provided that when an application is made to the High Court under Section 543 of the Companies Act, 1956 (section 235 of the Indian Companies Act, 1913), against any officer of a banking company for repayment or restoration of any money or property and the applicant makes out a prima facie case against such person, the High

Court shall make an order against such person to repay and restore the money or property unless he proves that he is not liable to make the repayment or restoration either wholly or in part. It is clear from the scheme of Section 45H that once a prima facie case is made out it is for the person proceeded against to prove that he is not liable to make the repayment or restoration of property. Before the company judge after giving oral evidence it was never represented by Vastulal that he desired to prove that he was not liable to restore the amounts appropriated towards his losses. The High Court, on the materials placed before it, was therefore amply justified in holding that the amount of Rs. 24,846-11-0 which the appellant was directed to pay had been misapplied by him to discharge his liability in respect of the transactions of Messrs, B. R. Pareek & Sons Ltd. and he was on that account liable to make good the same to the bank.

8. The plea of Vastulal with regard to the sum of Rs. 8,500 transferred to the account of M/s. Naraindas Aidan, which is the subject-matter of Appeal No. 435 of 1962, is wholly unsubstantial. The liquidator's case was that Vastulal was carrying on the business of selling and purchasing shares and securities through M/s. Naraindas Aidan--a firm of stock brokers--and Vastulal transferred to them Rs. 3,500 on December 13, 1949, and Rs. 5,000 on February 3, 1950. It is admitted that both these sums of money belonged to the bank. These amounts were admittedly credited in the account books of the stock brokers in the account of M/s. B. R. Pareek & Sons Ltd. and not on the bank's account. Vastulal in the first instance submitted that he could not, without looking into the records of the bank, state the purpose for which the two amounts were paid. He then inspected records of the bank and even thereafter he was unable to render any explanation why the two amounts were transferred to the stock brokers on behalf of the bank. The records of the bank do not throw any light on those transfers. It does not appear that the bank had any dealings with M/s. Naraindas Aidan. Tulsidas, a partner of the firm of M/s. Naraindas Aidan, was examined as a witness on behalf of the liquidator. He produced all his books of account and stated that his firm had never carried out any transaction on behalf of the bank and that there was no khata in the name of the bank in the firm's books of account. He disputed the plea of Vastulal that the amounts were credited in the books of account of the firm as having been paid on behalf of the bank. He produced office copies of the contract notes and statements of account in relation to the transactions contained in the firm's books of account, and asserted that the originals had been sent to Vastulal from time to time. He also showed from the books of account that Vastulal had suffered heavy losses in share transactions which were carried on through his firm. Vastulal did not produce the books of account of M/s. B.R. Pareek & Sons Ltd., which were admittedly in his possession, nor the statements of account received from M/s. Naraindas Aidan. There is no reference in the books of account of the bank to the purpose for which the two amounts were transferred to M/s. Naraindas Aidan. In these circumstances the only conclusion which could be arrived at was that the amounts which belonged to the bank were misapplied by Vastulal for discharging his personal liabilities and they were not appropriated for any purpose of the bank.

9. Counsel for the appellant contended that as the amounts which were transferred to the two brokers were by cheques or bills of exchange drawn on other banks in favour of stock brokers, such bills of exchange or cheques being drawn in accordance with the provisions of the Negotiable Instruments Act, 1881, according to the general practice prevailing in the business community, evidence to prove that the amounts were not paid by the bank or for the purpose of the bank was

inadmissible. This argument proceeds upon a misconception of the question in dispute which falls to be determined in these appeals. The amounts of Rs. 18,500 and Rs. 8,500 which were transferred to the stock brokers belonged to the bank. This is admitted. It is also common ground that the amounts were transferred under bank drafts or cheques drawn by Vastulal acting on behalf of the bank. The case of the liquidator was that Vastulal, taking advantage of the authority conferred upon him, misappropriated the funds of the bank and utilised the same for his private purposes and was on that account guilty of misfeasance. We fail to appreciate how any question as to admissibility of evidence contrary to the terms of a bill of exchange or a cheque arises in this case. The respective cases before the court were the case of the liquidator who claimed that the funds belonging to the bank had been utilised wrongfully by Vastulal for discharging his personal liabilities to the share brokers and the case of Vastulal, the appellant, in respect of the amounts transferred to M/s. S. Ramdas was that the amount of Rs. 18,500 was transferred for the purpose of purchasing on behalf of the bank debentures of the Calcutta Electric Supply Co. Ltd. In considering this case the court looked at the conduct of Vastulal, the documentary evidence and held that the story of Vastulal that the amount of Rs. 18,500 was sent for purchasing debentures was untrue. Proof of the case of the liquidator is not prohibited by anything contained in the Negotiable Instruments Act, 1881, or the Indian Companies Act, 1913. Section 27 of the Negotiable Instruments Act on which reliance was placed by the counsel merely deals with the authority of an agent to bind his principal : it does not prohibit proof of the fact that taking wrongful advantage of his authority the agent has misappropriated funds belonging to the principal or has applied them to purposes for which he had no authority to apply. It is true that in drawing the cheques or bank drafts, Vastulal purported to act on behalf of the bank, but in so doing he gave directions for appropriating the property of the bank to his own purposes. Proof of such a case is not prohibited by the Negotiable Instruments Act.

10. The appeals must therefore fail and are dismissed with costs. One hearing fee.