Indian Overseas Bank vs Industrial Chain Concern on 7 November, 1989

Equivalent citations: 1989 SCR, SUPL. (2) 27 1990 SCC (1) 484, AIRONLINE 1989 SC 53, 1990 (1) SCC 484, (1990) 1 MAD LJ 40, (1990) 2 CIV LJ 1, (1989) 2 MAD LW 427, (1990) 1 UPLBEC 636, (1990) 1 CUR CC 277, (2010) 1 NIJ 147, (1990) 67 COM CAS 255, (1989) 4 JT 334, (1990) 2 BANK CLR 200, (1990) 1 APLJ 57, (1990) 2 BANK LJ 276, (1991) BANK J 218, (1990) 1 LJR 448, (1990) 2 CURCC 116, (1989) 4 JT 334 (SC), 2015 (17) SCC 29, (2016) 1 SCALE 298, (2016) 2 WLC(SC)CVL 213, 2018 (1) SCC (CRI) 515

Author: K.N. Saikia

Bench: K.N. Saikia, M. Fathima Beevi

PETITIONER:
INDIAN OVERSEAS BANK

Vs.

RESPONDENT:
INDUSTRIAL CHAIN CONCERN

DATE OF JUDGMENT07/11/1989

BENCH:
SAIKIA, K.N. (J)
BENCH:
SAIKIA, K.N. (J)
FATHIMA BEEVI, M. (J)

CITATION:
1989 SCR Supl. (2) 27 1990 SCC (1) 484
JT 1989 (4) 334 1989 SCALE (2)1014

ACT:
Negotiable Instruments Act--Section 131--Bank can avail of immunity as collecting banker--Opening of account--Duties of bank.

HEADNOTE:
The plaintiff--respondent filed original suit No. 7667 of 1975 against the appellant-Bank in the City Civil Court Madras for recovery of Rs.26,383.49 p. together with inter-

est and costs, being the amount of loss suffered by it on account of the negligence and conversion on the part of the appellant who negligently allowed one Sethuraman, Manager of the plaintiff's firm to open a "fictitious account" in the name of "Industrial Chain Concern" as its proprietor and helped him to pay in stolen drafts and cheques drawn in favour of the plaintiff, and by collecting the same and paying the proceeds thereof to Sethuraman, and closing the account thereafter. The plaintiff's case was that it was doing extensive business in steel Roller chains and sprockets with leading Industries and Government undertakings and had supplied goods to seven parties who sent to it drafts and cheques for Rs.26,383.49 p. which were received by Sethuraman, its Manager, who opened fictitious account in the name of the firm with the bank, and withdrew the amount defrauding the plaintiff. According to the plaintiff the Bank was negligent and guilty of conversion in opening the account as also in collecting the cheques. Hence it was liable to make good the loss suffered by it. The appellant-Bank denied the allegations of negligence levelled by the plaintiff. It stated that Sethuraman, who was a Collegemate of the Manager of the Bank was known to him earlier and at the time of opening the account he had represented to the Bank that he, as proprietor, had started a firm under the name and style of "Industrial Chain Concern" and had shown in that connection some business papers on the basis of which the Manager gave the introduction necessary to open the Account but the manager declined to grant overdraft facility asked for by him. The bank asserted that it acted in good faith throughout the dealings till the closure of the account.

The Trial Court held that the appellant bank had acted in good faith but not without negligence in opening the account and operating the same in the process of collection of cheques/drafts and that it was not

28

entitled to protection of section 131 of the Negotiable of Instruments Act. Accordingly it decreed the plaintiff's suit Bank's appeal to the High Court against the decree of the trial Court was dismissed. Hence this appeal by Special Leave.

Allowing the appeal, this Court,

HELD: As a general rule a banker before accepting a customer, must take reasonable care to satisfy himself that the person in question is of good reputation, and if he fails to do so he will run the risk of forfeiting the protection under section 131 of the Negotiable Instruments Act. What is "reasonable care", will depend on the facts and circumstances of the case. [45F-G]

The courts have tended to accept the practices and procedures which bankers lay down for themselves, but that can by no means be decisive. [45G]

Till an account is opened, no banker-customer relation-

ship exists between the bank and the person proposing to open an account. Once the account is open, the relationship is created and with it mutual rights and obligations between the banker and the customer are created under law. Opening an account by depositing cash is slightly different from opening one by a cheque as in that case, the Bank has to act according to the tenor of that instrument and its collection and payment involves the Bank's avowed duty to its real owner if the proposer happens not to be its real owner. Even when an account is opened by depositing cash but so soon after the opening of the account any cheque is paid into it as to make it part of the same transaction with the opening, the same duty may be implied by law. [34D-F]

One of the tests of deciding whether the Bank was negligent, though not always conclusive, is to see whether the Rules or instructions of the Banks were followed or not. In the instant case, Sethuraman having been known to the Manager who gave the introduction there was no violation of any instruction or Rules. [35E; 36D]

Except when circumstances of a case so justify in making inquiries the bankers attitude may be solicitious and not detective. It is difficult to hold that the Bank was negligent in opening the account, accepting the deposit of cash by a person known to the Manager of the Bank under the circumstances. [37G; 38B]

29

The bank normally has an obligation to collect the customer's cheques paid into his account. [42H]

In every case of opening an account bank takes a mandate and, until changed, controls the operation of the account. In the instant case having already opened the account the Bank was not concerned to question the customer's title to a cheque paid in by him, when a cheque was drawn in favour of 'industrial Chain Concern'. [41A-B]

If a banker fails to present a cheque within a reasonable time after it reaches him, he is liable to his customer for loss arising from the delay. A banker receiving instructions paid in for collection and credit to a customer's account may collect solely for a customer or for himself or both. Where he collects for the customer he will be liable in conversion if the customer has no title. However, if he collects in good faith and without negligence he may plead statutory protection under section 131 of the Act. [41D-E]

To enable a bank to avail the immunity under section 131 as a collecting banker he has to bring himself within the conditions formulated by the section. Otherwise he is left to his common law liability for conversion or for money had and received in case of the person from whom he took the cheques having no title or defective title. The conditions are: (a) that the banker should act in good faith and without negligence in receiving a payment, that is, in the process of collection, (b) that the banker should receive payment for a customer on behalf of him and thus

acting as a mere agent in collection of the cheque and not as an account holder (c) that the persons for whom the banker acts must be his customer and (d) that the cheque should be one crossed generally or especially to himself. The receipt of payment contemplated by the section is one from the drawee bank. It is settled law that the onus of bringing himself within the section rests on the banker. There is very little evidence relating to the deposit and particulars of cheques deposited and hence it is difficult to hold that the Bank ignored obvious indications and was negligent at that time. [41G-H; 42A; 48G]

Commissioner of Taxation v. English Scottish & Australian Bank, [1920] AC 683; Ladbroke & Co. v. Todd, [1914] 30 TLR 433; Turner v. London & Provincial Bank, [1903] 2 Legal Decisions Affecting Bankers 33; Mariani & Co. v. Midland Bank, [1968] 2 ALL E.R. 573 at 582; Lloyds Bank Ltd. v. E.B. Savory & Company, [1933] AC 201; Capital & Counties Bank v. Gordon, [1903] AC 240; Barclays Bank Ltd. v. Astley Industrial Trust Ltd.. [1970] 1 All E.R. 719; Arab
30
Bank Ltd. v. Ross, [1952] 1 All E.R. 709; Karak Rubber Co. Ltd. v. Burden (No. 2), [1972] 1 All E.R. 1210; Penmount Estates Ltd. v. National Provincial Bank Ltd., [1945] 173 LT 344; Motor Traders Guarantee Corpn. v. Midland Bank Ltd., [1937] 4 All E.R. 90; Bharat Bank Ltd. v. Kishanchand Chellaram, AIR 1955 Mad. 402; Sanyasilingam v. Exchange Bank of India, AIR 1948 Bombay 1; Woodbrier v. Catholic Bank, AIR 1958 Kerala 316; Orbit Mining & Trading Co. v. Westminister Bank, [1962] 3 ALL E.R. 565; Underwood v. Bank of Liverpool, [1924] 1 K.B. 775; Bapulal Premchand v. Nath Bank Ltd., AIR 1946 Bom. 482; Lloyds Bank Ltd. v. Chartered Bank of India, Australia & China, [1929] 1 K.B. 40 and Ross v. London County, Westminister & Parr's Bank Ltd., [1919] 1 K.B. 678, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2842 of 1982.

From the Judgment and Order dated 1.10.1981 of the Madras High Court in Appeal No. 516 of 1977.

C. Seetharamiah, P. Krishna Rao and K.R. Nagaraja for the Appellant.

S. Balakrishnan for the Respondent.

The Judgment of the Court was delivered by K.N. SAIKIA, J. This defendant's appeal by special leave is from the Judgment of the High Court of Judicature at Madras dated 1.10.1981 passed in Appeal No. 516 of 1977 dismissing the appeal and affirming the decree in O.S. No. 7667 of 1975.

The respondent--Industrial Chain Concern as plaintiff filed Original Suit No. 7667 of 1975 in the City Civil Court, Madras for recovery of Rs.26,383.49p. together with interest and costs, being the total amount of loss sustained by it on account of the alleged negligence and conversion on the part of the defendant--Indian overseas Bank having its central office at 151, Mount Road, Madras-2, hereinafter referred as 'the Bank', by negligently allowing one Sethura- man, Manager of the plaintiff firm at Madras to open a 'fictitious account' in the name of 'Industrial Chain Con- cern' as its proprietor and helping him to pay in stolen drafts and cheques drawn in favour of the plaintiff and collecting the same and paying to Sethuraman the proceeds thereof and closing the account thereafter. It was the case of the plaintiff that it was doing extensive business in Steel Roller Chains and Sprockets with leading industries and Government undertakings. Its head office was situate at 36, Linghi Chetti Street, Madras-1. It had supplied goods to seven parties who sent to it drafts and cheques in its name amounting to Rs.26,383.49 and those drafts and cheques had been received by Sethuraman, its Manager, who after opening the 'fictitious account' in the Bank's Nungambakkam Branch paid in the stolen drafts and cheques and the Bank collected those and allowed Sethuraman to withdraw the same defrauding the plaintiff. The plaintiff averred that the Bank was negligent and guilty of conversion in opening of the account, collection of the cheques and drafts and allow- ing Sethuraman to withdraw the same and therefore, it was liable to make good the plaintiff's loss.

The appellant Bank as defendant resisted the suit con- tending, inter alia, that it was not negligent in allowing Sethuraman to open the account inasmuch as approaching the Bank Sethuraman represented that he, as proprietor, had started a firm under the name and style of "Industrial Chain Concern" and proposed to open an account in that name. Since the Manager of the Bank at Nungambakkam Branch was erstwhile classmate of Sethuraman he (the Manager) knew him and gave the introduction relying on which the current account was opened and after opening the account, which was a real account and not a 'fictitious account' as alleged, various cheques and drafts had been paid into the account by the customer for collection and the Bank in good faith and without negligence, in course of its business, collected them and credited the account and Sethuraman as customer withdrew money from his account, and that neither at the time of opening the account for at the time of paying in and collection of the cheques, nor at the time of allowing money to be withdrawn there was anything to arouse any suspicion regarding the bona fides of the representation made by Sethuraman. Later on the customer having expressed a desire to close the account because, as he said, he was winding up his business, the account was closed. There was, therefore, no negligence on the part of the Bank acting in good faith and it was not liable for conversion.

At the trial the plaintiff firm examined its Manager D.R. Murthy (PW-1) while the defendant Bank also examined its Manager S.P. Muthukrishnan (DW-1). The trial court decreeing the suit held that the defendant Bank had acted in good faith but not without negligence in opening the account and operating the same and in the process of collection of the cheques and drafts and it was not entitled to invoke the protection of section 131 of the Negotiable Instruments Act and, consequently, it was liable to make good the loss with interest as claimed by the plaintiff. The Bank having ap- pealed therefrom, the High Court agreed with the findings of the trial court and dismissed the appeal.

Mr. C. Seetharamiah, the learned counsel for the appel- lant submits, inter alia, that the finding of the courts below that the defendant Bank was negligent in opening the account is contrary to law inasmuch as there were no circum- stances antecedent or present to arouse any suspicion and there was no obligation on the part of the Bank to compare and verify the name and address given by Sethuraman as proprietor, industrial Chain Concern with the address of the then existing plaintiff's firm of the same name; that the High Court's finding that tile Bank was negligent in clear- ing the amounts of the cheques is equally contrary to law inasmuch as there was nothing ex facie to put the Bank on guard and there was no warning or indication of defective title on the race of the cheques and drafts to arouse suspi- cion of the Bank and it was not necessary for it to make thorough enquiry about the cheques and drafts to have been entitled to invoke the protection of section 131 of the Negotiable Instruments Act: and that even assuming, but not admitting that the Bank was negligent, the plaintiff itself contributed to it by entrusting Sethuraman to receive the cheques and drafts and to deal with them for a long time and that even when the complaint was made to Deputy Commissioner of Police on 19.2.1975 it was about two cheques only, and there was still no complaint about other cheques and drafts. The first question to be decided, therefore, is whether the Bank was negligent in opening the account in the name of Sethurarman, as proprietor, Industrial Chain Concern. Mr. S. Balakrishnan, for the respondent, defends the High Court's Judgment.

Evidence of DW- 1 Muthukrishnan, Manager of the Bank at the relevant time is that the account was opened by Ext. B- 1, the Account Opening From, on 3.10.1974 by Sethuraman under the title Industrial Chain Concern, the sole proprie- tary concern. It was signed by Sethuraman for Industrial Chain Concern with a rubber stamp as proprietor. Muthukrish- nan, DW- 1 deposed:

> "This account was opened by R. Sethuraman under the title Industrial Chain Concern sole proprietary concern. Sethuraman is the sole proprietor. Before that date I knew Sethura- man. He was my college mate in 1955-57 in Vivekananda College. I was meeting him in social gathering. When he went to open an account, he represented that he had just started as commission agent under the name and style of Industrial Chain Concern as sole proprietary concern. He wanted to open an account with Overdraft facility. I declined his request for overdraft because he himself stated that he had just started commission business. I was able to identify him as the college mate and to open his account I have signed the introduction in my personal capac- ity ..... It was an ordinary current deposit account. The introduction given by me was in the normal course of bank- ing business. Before opening account, he showed me some business correspondence and orders. Some of the orders were placed by India Sugars and Refineries and Madras Ferti- lisers. At that time there was nothing to show that the Industrial Chain Concern was not a proprietary concern or that Sethuraman was an employee of the firm. He opened an account with cash deposit of Rs. 100 as he described himself as a proprietary concern and as he just then started the business and as I did not grant loan facility there was no occasion for calling credit reports from other bankers. There was normal operation of the account. Cheques given in the name of the concern were deposited in the account and after realisation they were withdrawn."

Comparing the statement of Account and Ext. B1 with the above evidence there is nothing to doubt this witness. He denied that at any stage the Bank had acted with negligence or without good faith or that there was no proper introduc- tion for opening an account. He clearly said that the ad- dress given in Ext. B1 was Nallathambi Mudali Chetti Street and that he knew the location and it was far away from Nungambakkam. That was the place of business of Sethuraman mentioned at the opening of account and the Mount Road Branch of the defendant Bank was the nearest Branch for that place. Opening of an account by Sethuraman with a trading place at Nallathambi Street with Nungambakkam Branch oc- curred to him as unusual but it did not create any suspicion as he asked Sethuraman why he wanted to open an account in Nungambakkam Branch and Sethuraman replied: "I am a commis- sion Agent. I want overdraft facility. Your are the only agent known to me and that is why I have come to Nungambak- kam Branch." DW-1 also said that in opening the Current Account he glanced through the order and correspondence shown to him by Sethuraman regarding supplies but he did not check up the address given in the correspondence by these companies in the name of the Industrial Chain Concern. He denied that he had not checked up the business credentials for the account to be opened in the name of the business concern and that he was negligent in that aspect. He said:

> "I declined overdraft facility. That itself shows that I was not negligent. Once I declined overdraft facility it did not strike me to refer Sethuraman to the nearest branch from his trading place. I did not refer him to the Mount Road Branch. I suggested he can go to the Mount Road Branch. He came with another request that his overdraft application might be considered after the period of about one year, after his business had improved. Therefore, he wanted to open an account in Nungambakkam Branch." Both Courts below held that the Bank acted in good faith. We agree. The question is whether the Bank could be held to have been negligent while opening the account. It is, however, necessary to bear in mind that this question is often associated with the question of negligence in collecting cheques, etc. for the customers paid into the account. This is because till an account is opened no bank- er-customer relationship exists between the bank and the person proposing to open an account. Once the account is opened, that relationship is created and with it mutual rights and obligation between the banker and the customer are created under law. Opening an account by cash is a little different from opening an account by a cheque as in that case the Bank has to act according to the tenor of that instrument and its collection and payment involves the Bank's duty owed to its real owner if the proposer happens not to be its real owner. Even when an account is opened by depositing cash but so soon after the opening of the account any cheque is paid into it as to make it part of the same transaction with the opening, the same duty may be implied by law.
>
> What is the standard of care to be taken by a Bank in opening an account? In the Practice and Law of Banking by H.P. Sheldon, 11th Edition, in Chapter five at page 64 it is said:

> "Before opening an account for a customer who is not already known to him, a banker should make proper preliminary inquiries. In particu- lar, he should obtain references from respon- sible persons with regard to the identity, integrity and reliability of the proposed customer.
>
> If a banker does not act prudently and in accordance with current banking prac- tice when obtaining references concerning a proposed customer, he may later have cause for regret."

M.L. Tannan in Banking Law and Practice in India, 18th Edition at page 198 says:

> "Before opening a new account, a banker should take certain precautions and must ascertain by inquiring from the person wishing to open the account, if such person is unknown to the banker, as to his profession or trade as well as the nature of the account he proposes to open. By mak-
>
> ing necessary inquiries from the references furnished by the new customer, the banker can easily verify such information and judge whether or not the person wishing to open an account is a desirable customer. It is neces- sary for a bank to inquire, from responsible parties, given as references by the customer, as to the latter's integrity and respectabili- ty, an omission of which may result in serious consequences not only for the banker con- cerned, but also for other bankers and the general public."

One of the tests of deciding whether the Bank was negli- gent, though not always conclusive, is to see whether the Rules or instructions of the Banks were followed or not. We may accordingly consult those instructions. Ext. B6 contains the general instructions regarding constituent accounts for bank. Mark II deals with opening of accounts. It says:

> "Except at large branches where the sub-agent or accountant may be authorised to open Cur- rent Accounts, no new Current Account shall be opened without the authority of the agent manager who is solely responsible for all Current Accounts being opened in the proper manner. A written application on the appropri- ate form must be submitted and will be init- ialled by the agent at the top left corner after he has satisfied himself of the respect- ability of the applicant(s). It is important that every party must be introduced to the Bank by a respectable person known to the Bank, who must normally call at the Bank and sign in the column specially provided for the purpose in the account opening form. In all cases his signature must be verified with the specimen lodged and attested. The agent or accountant may introduce constituents to the Bank provided they are known to him personally and in such cases he should sign the applica- tion form at the appropriate place in his personal capacity. When the introduction of any other member of the staff is accepted, the agent must invariably make independent inquiry and record his findings on the account opening form for future reference if the need arises ....."

Mark IV deals with accounts of proprietary concerns. It says:

> "An individual trading in the name of concern should fill in form F.S. 5 and sign it in his personal name and also affix his signature on behalf of the concern as proprietor in the space provided."

if the Banker was negligent in following up the references given at opening of account and subsequently cheques etc. are collected for the customer paid into that account and those happened to be of someone else the Bank may be liable for conversion, unless protected by law. In the instant case, Sethuraman having been known to the Manager who gave the introduction, there was no violation of any instruction or Rules.

It was held in Commissioner of Taxation v. English Scottish and Australian Bank, [1920] AC 683, that a negli- gence in collection is not a question of negligence in opening an account, though the circumstances connected with the opening of an account may shed light on the question whether there was negligence in collecting a cheque. In Ladbroke & Co. v. Todd, [1914] 30 TLR 433, the plain- tiff drew a cheque and sent it to the payee by post. The letter was stolen and the thief took it to the defendant, a banker, and used it for the purpose of opening an account- for the purpose of which he forged the payee's endorsement. The defendant accepted believing him to be the payee. He was not introduced to the Bank and no references were obtained. The defendant opened the account and the cheque was special- ly cleared at the request of the thief, and he drew out the proceeds on the next day. On the discovery of the fraud the plaintiff brought an action against the defendant for con- version. One of the main questions raised was whether the account having been opened by payment in all the cheques to be collected the defendant could be properly regarded as having received payment for a customer. It was held that as account was already opened when the cheque was collected, payment had been received for a customer. The drawer there- upon sent another cheque to the real payee and took an assignment of his rights in the stolen cheque and, as hold- ers of the cheque or alternatively as assignees, brought an action against the bank to recover the proceeds collected by the bank as money had and received to their use. Evidence was given that it was the general practice of bankers to obtain a satisfactory introduction or reference. It was held that the banker had acted in good faith, but was guilty of negligence in not taking reasonable precautions to safeguard the interests of the true owner of the cheque and that therefore he had put himself outside the protection of section 82 of the Bills of Exchange Act, 1882. Bailbache, J. also said that the banker would have been entitled to the protection of the section as having received payment for a customer, but had lost it owing to his want of due care. It was also held that the relation of banker and customer began as soon as the first cheque was handed in to the banker for collection, and not when it was paid.

In Turner v. London and Provincial Bank, [1903] 2 Legal Decisions Affecting Bankers 33, evidence was admitted as proof of negligence, that the customer had given a reference on opening the account and that this was not followed up. In the instant case there was no question of a reference inasmuch as the Manager himself knew Sethuraman and gave the introduction. The account was not opened by depositing any cheque but by depositing case of Rs. 100. The first cheque was paid into the account later and there is nothing to show that it formed part of the same transaction. No

particulars have been proved as to the tenor of that cheque. The Manager made several inquiries which in the facts and circumstances of the case, in our view, were sufficient, for it is an accepted rule that the banker may refrain from "making inquiries which it is improbable will lead to detection of the potential customer's purpose if he is dishonest and which are calculated to offend him and may drive away his customer if he is honest," Marfani & Co. v. Midland Bank, [1968] 2 All E.R. 573 (582). Except when circumstances of a case so justifies, in making inquiries the banker's attitude may be solicitous and not detective. Sethuraman was believed when he said that he was the proprietor of Industrial Chain Concern which he recently started. He showed some orders and references in proof of his business. The banker believed in existence of his business but did not meticulously examine the addresses. Sethuraman was asked as to why he wanted to come to that branch and his reply was that he expected there to have overdraft facility and when that was refused he expressed that after his business improved he would expect to be granted overdraft facilities after one year. There is no doubt that Sethuraman was a rogue, but he prepared the plan intelligently and the banker in good faith believed in his statements. We, therefore, find it difficult to hold that the Bank was negligent in opening the account accepting the deposit of cash by a person known to the Manager of the Bank under the above circumstances.

Mr. Balakrishnan has argued that a cheque for Rs.2,800 was paid in on the same date which was a stolen cheque and it ought to have aroused suspicion of the banker. But there is nothing to show that it formed part of the same transac- tion. As we have already observed, once an account is opened the relationship of banker and customer begins. Duration is not of the essence. As was held in Ladbroke & Co. (supra) the mere opening of an account without the actual transac- tion was sufficient to constitute the relationship and this view was followed in Commissioner of Taxation v. English Scottish and Australian Bank (supra) and it was stated that the word 'customer' signifies a relationship of which dura- tion is not of the essence. The contract is not bet-

ween a habitue and a newcomer, but between a person for whom the bank performs a casual service ..... and a person who has an account of his own at the bank. Lord Chorley has even expressed the view that for the purpose of establishing the relationship of banker and customer there appears to be no logic in the actual opening of the account, and when the banker agrees to accept the customer the rela- tionship comes into existence at that time though the ac- count may not be opened until later. According to the author "the relationship being contractual should be subjected to the normal rules of contract law and the making of the contract depends on the acceptance of the offer. This con- tract could clearly be effected before an account had actu- ally been opened though it would state that there must be an agreement to open an account before the banker and customer relationship can exist." In the instant case there is, therefore, no doubt that the first cheque was subsequently paid in by Sethuraman as a customer and the Bank was to collect it on account of the customer. The Bank, therefore, in collecting the cheque and paying the proceed to Sethura- man acted as a Collecting Banker and can be held negligent, if at all, only as such as it was to collect it on account of the customer. In fact, from the statement of account it is clear that the account was opened on October 3, 1974 and was closed on February 1, 1975 and there were a number of transactions of deposits and withdrawals. The detailed particulars of the cheques paid into the account are not in evidence, it is, therefore, difficult to know whether each individual cheque or draft should have aroused suspicion in the mind of the Banker before accepting the same for collec-

tion from its customer.

The High Court did not analyse the legal position and did not consider the facts and circumstances in this regard in proper perspective. We are not inclined to hold the Bank negligent in opening the account considered alone. The next question is whether the Bank was negligent in collecting the cheques. In collecting a cheque on account of a customer the banker is protected by section 131 of the Negotiable Instruments Act, 188 1 (26 of 1881) hereinafter referred to as 'the Act' which reads:

> "131. Non-liability of banker receiving payment of cheque--A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such pay- ment.
>
> Explanation--A banker receives payment of a cros-
>
> sed cheque for a customer within the meaning of this section notwithstanding that he cred- its his customer's account with the amount of the cheque before receiving payment thereof."

In the section the words 'a cheque crossed generally or specially to himself' are important to be noted. Section 131 corresponded to section 82 of the Bills of Exchange Act, 1882 of England which was repealed by the Cheques Act, 1957 and the protection there is now given by section 4 of the Cheques Act, 1957. English decisions can, therefore, be guide in this regard.

In Lloyds Bank Ltd. v. E.B. Savory and Company, [1933] AC 20 1, the bank was held to be negligent (depriving it of the protection of section 82) not to ask a customer though respectively introduced the name of his employer and in the case of a married woman the name of her husband's employer. This is a case where a fraud had arisen through an employee stealing cheques from his employer and placing them into the credit of his account. Had the bank known his employer, enquiries would have been made.

The request for special collection as in case of Lad- broke & Co. (supra) was absent in this case as the account continued for quite some time. Even in case of special collection it was held that it was desired for the purpose of learning quickly whether or not the cheques will be paid. This case was mentioned in Marfani and Co. Ltd. v. Midland Bank Ltd., (supra) where the Midland Bank had make a special collection without being asked by their customer. It was decided that this did not indicate that the bank's suspi- cions were aroused which would require further inquiry. It was found that the bank took upon a special collection for the reasons (a) that the cheque was for a large sum, so that it was in their interest to collect quickly and (b) that the customer about to buy a restaurant might require the pro- ceeds quickly. In the Court of Appeal, Diplock LJ said that the 'significance' of the special clearance depends upon the Judge's assessment of the credibility of the bank officials who gave evidence; and he saw no reason to differ from him. In the instant case we have no reason to disbelieve what was said by the Manager, DW- 1.

In the instant case in the absence of any evidence giving the details of the cheques and their tenor, we are unable to hold that there were notices and circumstances which ought to arouse suspicion on the part of the bank. The bank normally has an obligation to collect the customer's cheques paid into his account. In Halsbury Laws of England, 4th Edn., Vol. 3 at para 46 we read:

> "46. Customer's title to money paid in. In the absence of notice, express or implied the banker is not concerned to question the cus- tomer's title to money paid in by him. al- though if a person entrusted with a cheque wrongfully pays it to the bank to the credit of someone who is not entitled to it, the true owner, if he has given notice to the bank of his title while the credit remains, may recov-
>
> er the amount from the bank as money had and received; or as damages for conversion .....
>
> A banker should be very cautious in accepting for a customer's account any cheque drawn by him as agent upon his principal's account, however broad may be the authority to draw. If the court detects circumstances which should arouse suspicion that the agent was abusing his authority, the banker will be liable to the principal even though the cheque was crossed."

This is because in every case of opening an account bank takes a mandate and, until changed, controls the operation of the account. In the instant case, having already opened the account the Bank was not concerned to question the customer's title to money paid in by him, when a cheque was drawn in favour of Industrial Chain Concern. In Capital and Counties Bank v. Gordon, [1903] AC 240, the House of Lords accepted the position that a bank acts basically as a mere agent or conduit pipe to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of its customer. Unless crossed the banker himself is the holder for value. He may be a sum collecting agent or he may take as holder for value or as holder in due course. As an agent of the customer for collection he is bound to exercise diligence in the presentation of the cheques for payment within reasonable time. If a banker fails to present a cheque within a reasonable time after it reaches him, he is liable to his customer for loss arising from the delay. A banker receiving instruments paid in for collection and credit to a customer's account may collect solely for a customer or for himself or both. Where he collects for the customer he will be liable in conversion if the customer has no title. However, if he collects in good faith and without negligence he may plead statutory protection under section 131 of the Act.

In the instant case in the absence of evidence on record we find it difficult to ascertain whether the bank was collecting the cheques merely as agent of the customer or as holder for value or as holder in due course. Some of the entries in the statement do show deposits and withdrawals of lesser amounts on the same date, but that is not enough for arriving at any conclusion whether the bank was collecting as a holder for value and not merely as an agent of the customer.

To enable a bank to avail the immunity under section 131 as a collecting banker he has to bring himself within the conditions formulated by the section. Otherwise he is left to his common law

liability for conversion or for money had and received in case of the person from whom he took the cheques having no title or defective title. The conditions are: (a) that the banker should act in good faith and with- out negligence in receiving a payment, that is, in the process of collection, (b) that the banker should receive payment for a customer on behalf of him and thus acting as a mere agent in collection of the cheque and not as an account holder (c) that the person for whom the banker acts must be his customer and (d) that the cheque should be one crossed generally or especially to himself. The receipt of payment contemplated by the section is one from the drawee bank. It is settled law that the onus of bringing himself within the section rests on the banker. In Capital and Counties Bank v. Gordon, (supra) as we have seen, the conception of a col- lecting banker was that of "receiving the cheque from the customer, presenting it and receiving the money for the customer, and then, and not till then, placing it to the customer's credit, exercising functions strictly analogous to those of a clerk of the customer sent to a bank to cash an open cheque for his employer." If the banker performs these functions in course of his business, in good faith and without negligence he will be within section 131 of the Act. We have already observed that the principle enunciated in the Commissioners of Taxation v. English Scottish and Australian Bank, (supra) is that the opening of the account is material as shedding light on the question whether there was negligence in collecting a cheque does bring out the true position that there must be sufficient connection established between the opening of the account and the collection of the cheque before a defence under section 131 could be held to be barred. The question would then be one of facts as to how far the two stages can be regarded as so intimately associated as to be considered as one transac- tion. We have already found that in the instant case there was no evidence to show that the opening of the account and the collection of the cheques and drafts formed part of the same transaction. Where a banker in good faith and without negligence receives payment for a customer of a cheque and the customer has no title or a defective title to the cheque, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment. The banker is not to be treated for purposes of the protective section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, endorsement of the cheque or other instrument to which the section applies. This has to be so because the drawer of the cheque is not a customer of the bank while the payee is. Where the protection attaches, it covers the receipt of the cheque and every step taken in the ordinary course of busi- ness and intended to lead up to the receipt of payment. Even if there was negligence in opening of the account that act ipso facto would not result in loss to the true owner of the cheque collected. While collecting the cheque for a customer the bank is under obligation to present it promptly so as to avoid any loss due to change of position. When it receives the money collected then also there is no direct loss to the true owner. It is only when the amount is paid or withdrawn by the customer that the loss results. During this period what is important to note is that at every step in collec- tion of the money and making payment the banker is bound by the banker--customer relationship and rights and obligations flowing therefrom. Even so, if there was anything to rouse suspicion regarding the cheque and ownership of the customer the banker may find itself beyond the protection of section

131. The scope or ambit of possible suspicion will depend on various situations that may have prevailed between the drawer of the cheque and the customer. In the instant case Sethuraman having been believed to have been the proprietor of Industrial Chain Concern the cheques payable to Industri- al Chain Concern left little scope to have aroused any suspicion in the minds of the Bank.

The position may have been different if Sethuraman was known as acting as an employee of Industrial Chain Concern and the cheques were payable to that concern, but were deposited into personal account of the employee which was not the case here. The requirement of receiving payment for a customer enunciated clearly in Capital and Counties Bank Ltd. v. Gordon, (supra) was extended in Barclays Bank Ltd. v. Astley Industrial Trust Ltd., [1970] 1 All E.R. 719 wherein it was held that the banker may receive payment for himself and yet be enti- tled to the protection where, acting in a purely collecting capacity, he has nevertheless a lien or is otherwise a holder for value.

There can be no doubt that the existence of a Current Account created relationship of banker and customer in this case. Sethuraman would be a customer even if his account was over drawn until that account was closed. In Halsbury's Laws of England, 4th Edn., Vol. 3 at para 103 it is said:

> "If the banker wishes to plead the statutory protection, his dealings throughout must be in good faith and without negligence. The alter- native liability arising from negligence renders the question of good faith practically superfluous, and it is seldom, if ever, raised. Negligence in this connection is breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the interests of the true owner."

It is a settled law that the test of negligence for the purpose of section 131 of the Act is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present is so out of the ordinary course that it ought to arouse doubts in the banker's mind and cause him to make inquiries. Lloyds Bank Ltd. v. E.B. Savory and Co., (supra), Marfani & Co. Ltd. v. Midland Bank Ltd., (supra), Arab Bank Ltd. v. Ross, [1952] 1 All E.R. 709 and Karak Rubber Co. Ltd. v. Burden, (No. 2) [1972] 1 All E.R. 1210. are some of the authorities laying down the above rule. The banker is bound to make inquiries when there is anything to rouse suspicion that the cheque is being wrongfully dealt with in being paid into the customer's account. However, the banker is not called upon to be abnormally suspicious, as was held in Penmount Estates Ltd. v. National Provincial Bank Ltd., [1945] 173 LT 344. It was held in Motor Traders Guarantee Corpn. v. Midland Bank Ltd., [1937] 4 All E.R. 90, that disregard of the bank's own regulations may be evidence of negligence. In the instant case no such regulation of the bank has been produced so as to establish that in collecting the cheque and allowing the customer to withdraw the bank violated its own regulations. Nor has the plaintiff been able to show that the transactions in paying in the drafts and cheques coupled with the circumstances antecedent and present were so out of the ordinary that it ought to arouse doubts in the Banker's mind and cause him make inquiries. As we have observed that the Bank's negligence in not making inquiries as to the customer upon opening an account if there was any, could shed light in its negligence in col- lecting the cheques for him. But we have found that there was no such negligence in this case. Mr. Balakrishnan's submission that in this case while opening the account, the appellant should have inquired of the plaintiff's firm does not reasonably follow in view of the fact that what Sethura- man said was that he was the proprietor off the newly estab- lished firm "Industrial Chain Concern" and if that was the name of the payee in the cheques, Sethuraman having been accepted as its proprietor there would be no room for suspi- cion that the firm's cheques were being paid into the pro- prietor's personal account. There is no allegation and proof that the collection and payment were made contrary to the tenors of the

instruments. Carelessness could occur at the time of collection especially if there was failure to pay due attention to the actual terms of the mandate. The actual circumstances at the time of paying in for collection, if the amount was very large one might raise suspicion. But in this case the first cheque paid in was of 2,800.17p. which could not be regarded as such a large amount to have aroused suspicion considering the fact that the firm was 'Industrial Chain Concern', dealing in industrial chains and pulleys.

Bharat Bank Ltd. v. Kishanchand Chellaram, AIR 1955 Madras 402; Sanyasilingam v. Exchange Bank of India, AIR 1948 Bombay 1; Woodbrier v. Catholic Bank, AIR 1958 Kerala 316, applied the accepted principles to the facts. In Orbit Mining & Trading Co. v. Westminister Bank, [1962] 3 All E.R. 565, Harm LJ said: "It cannot at any rate be the duty of a bank continually to keep itself upto date as to the identity of a customer's employer", though he is presumably required to know the identity of the employer. That case is distin- guishable on facts. Underwood v. Bank of Liverpool, [1924] 1 K.B 775, was a case of a Director paying into his own pri- vate account cheques in favour of the company duly endorsed by himself as sole Director and as such distinguishable on facts.

In Bapulal Premchand v. Nath Bank Ltd., AIR 1946 Bom. 482, Chagla J, as he then was, in the facts of that case expressed that in his opinion, there was no absolute and unqualified obligation on a bank to make inquiries about a proposed customer and that modern banking practice required that a customer should be properly introduced or the bank should act on the reference of some one whom it could trust. Therefore, perhaps in most cases it would be wiser and more prudent for a bank not to accept a customer without some reference. But he was not prepared to go so far as to sug- gest that after a bank had been given a proper reference with regard to a proposed customer and although there was no suspicious circumstances attendant upon the opening of the account, it was still incumbent upon the bank to make fur- ther inquiries with regard to the customer. In that case the manager of the defendant-bank accepted.the reference of the cashier Modi and also in fact made certain inquiries of Modi as to the position and status of the customer. It was held that it was not obligatory upon the defendant-bank to make any further inquiries about his customer and in having failed to make any such further inquiries in his Judgment they were not guilty of negligence. In the instant case the Manager himself gave the introduction.

As a general rule a banker before accepting a customer, must take reasonable care to satisfy himself that the person in question is of good reputation; and if he fails to do so he will run the risk of forfeiting the protection given by section 131 of the Act but 'reasonable care' will depend on the facts and circumstances of the case. The courts have tended to accept the practices and procedures which bankers lay down for themselves, but that can by no means be decisive. The "type of necessary inquiry at the opening of an account seems to be less stringent at present than it was a generation ago, and it is difficult to spell out from the cases any hard and fast rules." This is so because, in the words of Lord Chorley, the use of banking facilities at the present day "has become so wide spread and has penetrated so far into social strata where banking accounts were previously unknown, that precautions at one time considered necessary are now difficult in the press of business to apply. One of the obvious problems is that of the dishonest employee who may wish to open a bank account for the purpose of getting cheques collected for which he has stolen from his employer. If the banker is aware of his employment he will naturally watch that those cheques of which the employer is payee,

or in which he is otherwise interested, do not pass through the account. But how far can he be expected to keep himself informed of the employment of all his customers? This is typical of the problems which have faced the judges, and on which their views have tended to vary from time to time, and indeed from judge to judge." The above problem has been realised by the courts in England and India. In Marfani & Co. v. Midland Bank (supra) a man called Kureshy who was minded to cheat his employers, the plaintiffs in the case went to a branch of the defendant bank and asked to open an account giving the name of Sheik Eliaszade and also those of the referees. He was allowed to do so immediately, before the references had been taken up, and paid Pound 50 the same day. The next day he paid in a further Pound 35 in cash and the plaintiffs' cheque for Pound 3,000 made payable to one Eliaszade which he had stolen from them. His object in opening the account was to get this cheque collected by the defendant bank. The defendants in fact had this cheque collected spe- cially on the day it was paid in, and on the same day wrote to the referees. On the next day the defendants received the proceeds of the cheque, and one of the officers of the bank on same day had an interview with one of the referees who was a customer at the same branch and who gave a favourable account of Eliaszade which satisfied the manager--the other referee never replied. During the following days Kureshy drew out the whole of the Pound 3,000; indeed he tried to draw out substantially more. On discovering the fraud the plaintiffs sued the defendant bank for the conversion of their cheque. When the defendants pleaded section 4 of the Cheques Act, 1957, the plaintiffs contended that they had been negligent under four heads:

(i) They had taken no steps to identify the proposed custom- er, without which the referee's good opinion was valueless.

(ii) No inquiry was made as to the antecedents of Kureshy.

(iii) Only one referee responded to the bank's inquiry

(iv) The cheque was in fact collected before the references had been taken up.

The defendants called evidence that they had done all that was usual in such a case, and claimed that this proved that they had acted with due care. It was held that the defence succeeded.

It is thus clear that the question of negligence or no negligence depends entirely on the facts of each individual case and thus makes it difficult to judge in advance how any particular litigation involving allegations of negligence will go. In the instant case Sethuraman had in effect opened another account in the name of the plaintiff firm and oper- ated it himself as its proprietor.

As we have already observed, carelessness on the part of the bank is most likely to occur at the time of collection of cheques especially in failure to pay due attention to the actual terms of the mandate. It is not here a case of play- ing the detective but of a careful examination of everything which appears on the front and back of the instrument. Each set of circumstances produces its own requirements. The instruments, crossing, type of crossing, per pro, pay cash or order etc. are important. The banker may be negligent in acting contrary to such mandate under appropriate circum- stances. In the instant case, however, no details regarding such mandates on the alleged

cheques are available. The High Court took the view that if the Manager of the Bank gave the introduction of Sethuraman to open the account in the plaintiff's name showing him is its proprietor with- out making any enquiry as to its true relationship with the concern then he was taking a risk and when it transpired that Sethuraman had made fraudulent representation then the Manager should be taken to have acted negligently. We are not inclined to agree inasmuch as while dealing with a customer for collecting a cheque, there is no contractual relation between the collecting banker and the true owner. The duty is implied by law. A conduct beneficial to the customer at the expense of the true owner when the Bank acts in good faith and without negligence, is no breach of that duty. It is from this position of the true owner that question of negligence under section 131 of the Act has to be viewed. The formula approved in Lloyds Bank Ltd. v. Chartered Bank of India, Australia and China, [1929] 1 K.B. 40, is that broadly speaking, the banker must exer- cise the same care and forethought in the interest of the true owner, with regard to cheques paid in by customer, as a reasonable man would bring on similar business of his own. Lord Dunedin in Commissioner of Taxation (supra) said that the bank's action must be in accordance with the ordinary practice of banking and bank cannot be held liable merely because they have not subjected an account to a 'microscopic examination'.

In Ross v. London County, Westminister and Parr's Bank Ltd., [1919] 1 K.B. 678, Bailhache J. took the view that the clerks and cashiers of the defendant bank would be attribut- ed the degree of intelligent and knowledge ordinarily re- quired of a person in their position to fit them for the discharge of their duties but that no microscopic examina- tion of cheques paid in for collection was necessary and that it was not expected that officials of banks should also be 'amateur detectives'. It could not be said that before opening an account in the name of a firm the Bank would be required to enquiry always whether any firm of the same name was already in existence or not. What facts ought to be known to the Bank, what inquiries he should have made and what facts were sufficient to cause the Bank reasonably to suspect that Sethuraman was not the true owner in the facts and circumstances of the case would depend on current bank- ing practice. What was the practice long time back when the use of banking facilities by the general public was much less widespread may not be a proper guide. It should also be noted that the duty of care owed by the Bank to the plain- tiff as owner of the cheque did not arise until the cheque was delivered to the Bank by the customer Sethuraman. It was then only that duty to make inquiries about the cheque arose. Those inquiries would depend on the apparent tenor of the cheque and the knowledge of facts that earlier inquiries ascertained. What we have to do is to look at all the cir- cumstances at the time of the paying in of the cheque by Sethuraman and to see whether those circumstances were such as would cause a reasonable banker possessed of the informa- tion gathered about Sethuraman to suspect that he was not the true owner of the cheque. There is very little evidence relating to the deposit and particulars of the cheques deposited and hence it is difficult to hold that the Bank ignored obvious indications and was negligent at that time. It is difficult to accept so speculative a proposition as what would have happened if inquiries had been made which were not made. It does not constitute any lack of reasonable care to refrain from making such inquiries which it was improbable to have led to detec- tion of the customer's fraud.

While arriving at the above conclusion we have borne in mind the standard of reasonable care and the banking prac- tices and its trend in a developing banking system in the country. Any stricter

liability may not be conducive. It will also be observed that expansion of the banker's liabil- ity and corresponding narrowing down of the banker's protec- tion under the provision of section 131 of the Act may make the banker's position so vulnerable as to be disadvantageous to the expansion of banking business under the ever expand- ing banking system. This is because a commercial bank, as distinguished from a Central bank, has the following charac- teristics, namely (a) that they accept money from, and collect cheques for, their customers and place them to their credit; (2) that they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly; and (3) that they keep current account in their books in which the credits and debits are entered. The receipt of money by banker from or on account of his customer constitute it the debtor of the customer. The bank borrows the money and undertakes to repay it or any part of it at the branch of the bank where the account is kept during banking hours and upon payment being demanded. The banker has to discharge this obligation and normally the banker would not question the customer's title to the money paid in. Applying the above principles of law to the facts of the instant case we are not inclined to hold that the Bank was negligent either in collecting the cheques and drafts or allowing Sethuraman to withdraw the proceeds. As we have taken the view that the bank was not negli- gent, it is not necessary to deal with the question of contributory negligence. Let the loss lie where it falls. In the result, this appeal succeeds. The impugned judg- ments are set aside and the appeal is allowed, but without any order as to costs.

Y. Lal Appeal allowed.