U.P. Union Bank Ltd. vs Dina Nath Raja Ram on 24 April, 1953

Equivalent citations: AIR1953ALL637, [1953]23COMPCAS433(ALL), AIR 1953 ALLAHABAD 637

JUDGMENT

Brij Mohan Lall, J.

1. This is a suit by the Official Liquidators of the U.P. Union Bank Limited to recover a sum of Rs. 2,677-5-8 from Messrs. Dinanath Raja Ram, a firm of cloth merchants, at Budaun. The bank being in liquidation, the suit has been instituted, by virtue of the provisions of Section 453 of the Banking Companies (Amendment) Act (20 of 1950), in this Court.

2. The defendant firm had a current account with the bank when it was a going concern. The defendant had overdrawn that account. The suit has been instituted to recover the amount of the overdrafts together with interest due to the bank from the defendant firm.

3. Two pleas have been put forward in defence. In the first place, it is contended that no interest is chargeable on the overdrafts. Secondly, it is contended that the bank had wrongly refused payment of a cheque for Rs. 1,500/- to the defendant firm and the amount of that cheque should be set off against the bank's claim.

4. The first plea can be easily disposed of. It is stated in Paragraph 1 of the plaint that the defendant had agreed "to repay on demand the amount advanced to him together with interest at the rate of 71/2 per cent, per annum."

In Para. 1 of the written statement this paragraph of the plaint is unreservedly admitted. This means that there is a clear admission by the defendant of the agreement set up by the plaintiff. In the additional places, however, it is stated that the defendant had not agreed to pay interest. This plea is inconsistent with the unqualified admission of the plaintiff's allegation contained in the earlier portion of the written statement. Moreover, the practice of charging interest on the amount overdrawn is so common with the banks that the Court is justified in taking judicial notice of the practice. It may also be pointed out that the learned counsel for the defendant did not press this plea at the time of arguments. The plea must, therefore, be rejected.

5. In order to appreciate the second plea, it may be mentioned mat one Syed Zia Ali Kazmi drew a cheque for Rs. 1,500/- in favour of the defendant firm and delivered it to it. The defendant presented the cheque to the plaintiff bank, but the cheque was dishonoured. The reason given in the Memo, attached to the cheque by the bank while returning it (the cheque) was that:

> "Payment cannot be made due to the shortage of funds."

6. It is now conceded by the bank that the drawer oi the cheque had sufficient funds in his account to enable the bank to make payment. In other words, it is no longer in dispute that the cheque was wrongly dishonoured by the bank. It is the amount of this cheque which is sought to be set off against the plaintiff's claim. The argument advanced by the defendant is that wrongful refusal to pay the amount of the cheque gave rise to a claim in favour of the defendant and the amount of this claim should be deducted from the bank's claim against the defendant.

7. Reliance is placed on Section 229, Companies Act (7 of 1913), which runs as follows:

> "Application of insolvency rules in winding up of insolvent companies -- In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent; and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company as may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section."

8. It may be pointed out that by reason of this section "rules" which are in force under the law of insolvency have been made applicable to winding up proceedings. The word "rules" has been used in this section as meaning the principles which regulate the affairs in insolvency proceedings. The term "rules" has not been used in the restricted sense of the rules framed by the High Courts under Section 79 of the Provincial Insolvency Act (5 of 1920). I am fortified in this view by the case of -- 'Anand Behari Lal v. Dinshaw & Co. (Bankers), Ltd.', AIR 1942 Oudh 417, at p. 421 (A), where the learned Judges held that the term "rules" as used in this section meant the "provisions" of the insolvency law.

9. The rule sought to be made applicable to the present case is that embodied in Section 45 of the Provincial Insolvency Act. This section runs as follows:

> "48. Mutual dealings and set off -- Where there have been mutual dealings between an insolvent & a creditor proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively."

10. It will follow that if a debtor has a counter claim against a bank in liquidation the bank cannot insist on demanding full payment of its claim without reducing it by the amount payable to the debtor. If the debtor is driven to the necessity of filing a claim against the bank he will be given a 'pro rata' payment along with other unsecured creditors. But if he is alleged to deduct the amount of

his claim from the amount payable by him to the bank, he will be entitled to deduct the full amount of his claim from the amount due from him to the banb. Therefore, the defendant insists on taking advantage of this rule of insolvency law.

Needless to say that he can take this stand. But this presupposes that he must have a valid claim. The Official Liquidators contend that by wrongly refusing to make payment the bank did not incur any obligation towards the defendant. Their contention is that the bank did become liable to compensate the drawer but not the defendant who was the payee. Therefore, the whole dispute between the parties to this litigation narrows down to the simple question whether a bank possessing sufficient funds in a depositor's account incurs a liability towards the payee of a cheque by wrongly refusing payment to him.

11. As between a payee and a bank there is no privity of contract. The payee is only an agent or messenger of the maker of the cheque to whom payment is made by the bank at his (marker's) request. If, therefore, the bank makes default it is guilty of breach of contract and liable to pay damages to the maker who is the contracting party and not to the payee who is the agent of the maker. The agent has no right of suit.

12. It is true that by virtue of Section 56 of the Trusts Act (2 of 1882), a beneficiary has been given a right "to have the intention of the author of the trust specifically executed to the extent of the beneficiary's- interest".

In other words a right to enforce a contract may, in the case of a trust, be enforced by a person who is not privy to the contract. But certainly it cannot be contended that the bank is trustee for the payee. By no stretch of imagination can the provisions of the Trust Act be made applicable to deposits held by a bank.

13. Nor can it be contended that the payee of a cheque is an assignee of money in the hands of a banker. The remarks made by Jessel M.R. in the case of -- 'Hopkinson v. Forester', (1875) 19 Eq 74 (B), may usefully be quoted in this connection. They run as follows:

> "A cheque is clearly not an assignment of money in the hands of a banker: it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honour the cheque, when he has sufficient assets in his hand; if he does not fulfil his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Byles J. in the case of -- 'Keene v. Beard', (1860) 8 C. B. (N. S.) 372 (C), but I am quite sure that learned Judge never meant to lay down that a banker who dishonours a cheque is liable to a suit in equity by the holder."

14. Reference may also be made to Hart on Law of Banking, Fourth Edition, page 445, where it is stated that:

> "A cheque in itself is merely a request to the banker to pay a certain sum. It dees not purport to be, and has not the effect of, an assignment to the payee of money in the hands of the banker. Nor is it accepted by the banker like a bill of exchange. Accordingly, the payee has in general no right of action for its dishonour against the banker on whom it is drawn. His only remedy if it is dishonoured is against the drawer or an indorser."

It will be useful also to refer to Halsbury's Laws of England, Hailsham Edition, Volume I, page 827 Para. 1348, where it is stated that: "If a banker without justification dishonours his customer's cheque he is liable to the customer in damages for injury to credit .... The holder has no remedy against the banker, unless the banker has admitted to him that he holds money especially to meet a particular cheque."

15. Turning to the Negotiable Instruments Act, one finds Section 31 as follows;

> "The drawee of a cheque having sufficient funds of the drawer in his hands, properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default."

16. It will thus appear that the drawee has been made liable to compensate the drawer, but he has not been made liable to compensate the payee. Had it been the intention of law to invest the payee with a right of action against the drawee, the Legislature would not have failed to say so in Section 31.

17. Section 30 of the Act runs as follows:

> "The drawer of a bill of exchange or cheque is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour hss been given to, or received by, the drawer as hereinafter provided."

18. It will be noticed that this section confers a right on the holder but this right has been given to him against the drawer and not against the drawee.

19. It will, therefore, follow that no 'prima facie' valid reason exists for departing from the well-recognized rule of law that a person who is not privy to a contract cannot enforce any right under it. But the learned counsel for the defendant referred to certain provisions of the Negotiable Instruments Act as impliedly creating rights in favour of the payee. Section 64 of the Act was referred to in this connection. The relevant portion of this section runs as follows:

> "Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties, thereto are not liable thereon to such holder..."

20. The word "respectively" used in this section makes it clear beyond doubt that the word "cheque" is to be read with the word "drawee', form as follows:

> In other words, this section reads in a simplified "Cheque must be presented for payment to the drawee thereof by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder."

21. The argument advanced by the learned counsel for the defendant is that this section implies that, in the event of presentation being properly made the holder can maintain a claim against the drawee. This connection is not sound.

This section does not lay down the rights and liabilities as between the holder and the drawee. It is confined to the rights and liabilities against the "other parties". The words "other parties" were the subject of interpretation in the case of--'Banaras Bank Ltd. v. Hormusji Pestonji', AIR 1930 All 648 (D). It was held that this phrase meant parties other than the drawee qua a cheque. This view was followed by the Punjab High Court in the case of -- 'Devi Ditta Mal Kirpal Singh v. Pratap Singh Harnam Sing', AIR 1933 Lah 176 (E). In the circumstances, I am not prepared to accept the contention put forward by the learned counsel for the defendant, viz., that impliedly this section recognizes the right of the holder of a cheque to enforce his claim against the drawee. As pointed out above, this section does not deal with the rights between the payee of a cheque and the drawee.

22. The next section referred to during the learned counsel's argument is Section 78 of the Act. It runs as follows:

> "Subject to the provisions of Section 82, Clause (c), payment of the amount due on a promissory note, bill of exchange or cheque must in order to discharge the maker or acceptor, be made to the holder of the instrument."

23. It is argued that this section recognizes the right of the holder of an instrument to demand payment from the bank. This contention also is not sound. This section lays down what payment by the bank will discharge the maker of a cheque. If the bank makes payment to a wrong person who is not the holder of cheque within the meaning of the term as used in Section 8 of the Act and the payee is thereby denied payment, the payee can certainly turn back and enforce his claim against the maker thereof. But if the payment has been made to the holder of the cheque, the payee cannot enforce such a claim against the drawer. It is significant that the section deals with the payee's claim against the drawer and not his right to receive payment from the bank. No right has been conferred by this section on the payee against the drawee, i.e., the bank.

24-34. Section 93 which was next referred to runs as follows:

> "When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or nonpayment, the holder thereof, or some party thereto who remains liable thereon, must give notice that the instrument has been so dishonoured

> to all other parties whom the holder seeks to make severally liable thereon, and to some one of several parties whom he seeks to make jointly liable thereon.
>
> Nothing in this section renders it necessary to give notice to the maker of the dishonoured promissory note or the drawee or acceptor of the dishonoured bill of exchange or cheque."

35. It is argued that Para. 1 of this section confers a right on the holder of a cheque to enforce his claim subject to the giving of notice of dishonour and Para. 2 dispenses with the necessity to give notice to the drawee of a dishonoured cheque. It is contended that reading the two paragraphs together one is led to the conclusion that in case of the dishonour of a cheque the holder can sue the drawee without giving notice to him. The language of the section does not, in my opinion, bear this interpretation. In this section also, as in Section 64, the important words are "others parties".

This section too defines the rights as between the holder and parties other than the drawee. In the case of dishonour of a cheque, the holder may have his remedies against several persons. e.g., the maker and the persons (whose number may be large) who had endorsed the cheque before it came to his hands. He has first to select which of these persons he seeks to make liable and then to give notice to him or them. The section was intended to confine the holder's right of enforcing the liability to only those who are otherwise liable under the law and to whom notice has been given. It was not intended to enlarge the holder's right so as to enable him to claim damages from persons against whom he has no remedy under the provisions of the Act. I am, therefore, of the opinion that this section also does not help the defendant.

36. Section 84 which was next referred to relates to a special set of circumstances. It says that if a cheque is not presented to the drawee within a reasonable time and if within this period the drawee, i.e., the bank goes into liquidation, the payee cannot enforce his remedy against the maker of the cheque. Since he is deprived of this right against the maker, the section confers on him a special right to obtain, from the bank 'pro rata' payment in respect of the amount of the cheque.

Since the payee is responsible for the delay in presentation of the cheque and for the consequent loss incurred thereby, he is penalised by depriving him of his remedy against the maker but is practically compensated by being invested with the right to receive 'pro rata' payment from the bank which right his drawer would have otherwise availed of. This right to receive payment is a special creature of the statute and can be exercised in the aforesaid circumstances only. Section 84 which creates this right does not recognize the payee's right in general to receive payment from the bank.

37. Similarly, Section 129 creates a special right to be exercised in special circumstances. It runs as follows:

> "Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same is crossed, or his agent for collection, being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid."

38. It lays down that if a banker makes payment of a crossed cheque otherwise than to a banker or to the special banker to whom the cheque is crossed he is liable to "the true owner of the cheque" for any loss he may sustain owing to the cheque having been so paid. The phrase "the true owner of the cheque" undoubtedly includes the payee. To this extent a right hat been conferred by Section 129 on the payee to maintain an action against the bank. But this right also has been specially created by the statute in the particular circumstances mentioned in the section. Because of the negligence on the part of the bank it has been made liable to compensate the payee in certain given circumstances. This section does not confer a right on the payee in general to enforce payment of a cheque against a bank.

39. Lastly, Section 117 was relied upon by the learned counsel in support of his contention. The opening paragraph of this section runs as follows: "The compensation payable in case of dishonour of a promissory note, bill of exchange or cheque, by any party liable to the holder or any indorsee, shall be determined by the following rules:

> ....."
>
> Then follow the rules which determine the amount payable. It is argued that this section confers on the holder of a cheque a right to enforce payment against the drawee. With this contention I am unable to agree. The language of the section indicates beyond doubt that this section is confined to laying down the rules for the calculation of compensation. It does not purport to lay down which party is liable to pay compensation to whom. The liability to make payment is to be determined by other sections of the Act. If any party is "liable to the holder", this section will come into play, otherwise it will not. The language of the section does not lend support to the contention that it confers a right on the holder to enforce payment against the drawee in i general.

40. Having given the matter my best consideration, I have come to the conclusion that the bank did not, by refusing payment of the cheque to the defendant, incur any liability to the defendant. The result, therefore, is that the defendant has no legitimate claim against the bank and there is nothing which can be set off against the bank's claim.

41. The bank's claim succeeds in toto. The suit is decreed for the recovery of Rs. 2,677-5-8 with 'pendente lite' and future interest at six per cent, per annum and with costs.