

Uco Bank vs Hem Chandra Sarkar on 25 April, 1990

Equivalent citations: 1990 AIR 1329, 1990 SCR (2) 709, AIR 1990 SUPREME COURT 1329, (1991) BANKJ 35, 1990 UJ(SC) 2 147, (1990) 2 UPLBEC 807, 1990 ALL CJ 537, (1990) 2 BANKCLR 337, (1990) 2 BANKLJ 1, (1990) 2 CURCC 240, (1990) 2 APLJ 48, (1990) 2 LJR 471, 1990 (3) SCC 389, (1990) 2 PUN LR 307, (1990) 3 JT 369 (SC), (1991) 70 COMCAS 119

Author: K.J. Shetty

Bench: K.J. Shetty, M. Fathima Beevi

PETITIONER:

UCO BANK

Vs.

RESPONDENT:

HEM CHANDRA SARKAR

DATE OF JUDGMENT 25/04/1990

BENCH:

SHETTY, K.J. (J)

BENCH:

SHETTY, K.J. (J)

FATHIMA BEEVI, M. (J)

CITATION:

1990 AIR 1329

1990 SCR (2) 709

1990 SCC (3) 389

JT 1990 (3) 369

1990 SCALE (1) 784

ACT:

Indian Contract Act, 1872 : Chapters IX and X--Bailment-Agency--Distinguishing features--Duty of Banker-bailee--What is--Bank entrusted with charge of goods/documents by customer--Whether an agent or bailee--Whether any fiduciary relationship exists between parties.

Banking Law--Bank and Customer--Existence of fiduciary relationship--Whether could be inferred from entries in current account.

HEADNOTE:

The respondent, who was indenting and lifting goods from

textile mills situated in different places, and was maintaining a current account with the appellant-Bank for this purpose, filed a suit against the Bank for accounts, damages, compensation and delivery of goods or their equivalent in money, for non-delivery of goods despite receiving payment thereof, contending that there was an oral agreement with the appellant-Bank, regarding receipt and payment of bills, etc. and receipt and storage of goods on his behalf, and delivery of goods to him as and when required. and that under the said terms and conditions. the Banker constituted himself and acted as an express trustee and/or agent of the respondent in relation to the said goods and documents and thus stood in fiduciary relationship with the respondent.

The appellant. denying the allegations, contended that it had never acted as an agent, trustee or depositary of the respondent in respect of the goods and documents and that no fiduciary relationship existed between the parties.

The trial court decreed the suit holding that from the evidence and entries in the current account, it could be inferred that there was agreement or arrangement between the parties, and the appellant acted as agent/trustee of the respondent. and that there was fiduciary relationship between the parties.

The High Court, affirming the decree of the trial court. held that

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if the respondent had paid the value of the goods and the appellant Bank neither delivered the goods nor rendered accounts. a fiduciary relationship could exist between the respondent and the Bank in respect of the goods for which value was paid by the respondent.

In the appeal, by special leave, on behalf of the appellant Bank it was contended that the Bank was only a collecting agent for the supply of goods, and not an agent or trustee for the respondent; adjustment of bills by debiting to the current account without cheques from the respondent would not change the ordinary relationship of bank and customer; no special relationship was created either by opening the current account or storing the goods meant for delivery to the respondent and there was nothing to take the parties outside the usual course of banking business; and the bank received and took charge of the goods only as bailee and any inference of fiduciary relationship between parties was unwarranted and unjustified.

Dismissing the appeal. this Court.

HELD: 1. The courts below were not justified in holding that a fiduciary relationship could exist between the parties in respect of goods for which the suit claim was based. This inference was drawn primarily from the debit entries in the respondent's current account. Collection of bills. remittances to mills. meeting expenses of storing the goods and debiting the same to the current account even without cheques from the respondent could not lead to an inference

that the Bank acted as agent of the respondent and that there was fiduciary relationship between parties. There is nothing in this method of operation to take the parties outside the ordinary relationship of banker and customer. This is the normal method of banking operation and the maintenance of the current account in the instant case is not outside this principle. [716D-G]

Law of Banking by Lord Chorley 10th ed. at 167- 168 and Paget's Law of Banking, 9th ed. at 8.2-83. referred to.

2.1 Banks take charge of goods, articles, securities as bailee and not as trustee or agent. Bailment is the delivery or transfer of possession of a chattel or other item of personal property with a specific mandate which required the identical res either to be returned to the bailor or to be dealt with in a particular way by the bailee as per directions of the bailor. One important distinguishing feature between agency and bailment is that the bailee does not represent the bailor. He merely exercises, with the leave of the bailor under contract or otherwise, certain

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powers of the bailor in respect of his property and the bailee has no power to make contracts on the bailor's behalf: nor can he make the bailor simply as bailor liable for any acts he does. [717D-F]

Fridman's Law of Agency 5th ed. p. 23, referred to.

In the instant case, there is nothing to indicate that the Bank represented some of the parties or the respondent with authority to change the contractual or legal relationship of parties. It cannot, therefore, be held that the Bank acted as agent of the respondent. [717G]

2.2 The banker bailee, gratuitous or for reward, is bound to take the same care of the property entrusted to him as a reasonable, prudent and careful man may fairly be expected to take of his own property of the like description. A paid bailee must use the greatest possible care and is expected to employ all precautions in respect of the goods deposited with him. If the property is not delivered to the true owner the banker cannot avoid his liability in conversion. [718C-D]

Having regard to the finding of fact recorded by the courts below, it is immaterial whether the Bank acted as bailee or in any other capacity. On the evidence adduced by the parties it has been established that the respondent did pay the price of the goods in respect of which he based his claim in the suit. The Bank having received the price of the goods from the respondent has failed to deliver the same. This finding has not been seriously disputed and the evidence adduced by the Bank was insufficient to establish the factum of delivery of goods to the respondent. Therefore the bank could not avoid the liability to return the goods as agreed upon or to pay an equivalent amount to the respondent. Even if it is assumed that the goods were delivered to a wrong person, the Bank has to own the responsibility to

pay the respondent. The liability of the banker to customer in such a case is absolute even if no negligence is proved. [717H; 718A; B, E]

Halsbury's Laws of England 4th ed. Vol. 3 paras 93 and 94. The Law Relating to Banking by T.G. Reeday 4th ed. p. 81 and Law and Practice relating to Banking by F.E. Ferry 5th ed. p. 21, referred to.

3. In practice, the bankers do not set up the statute of limitations against their customers or their legal representatives. There is no reason for making an exception to this practice in the instant case.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3566 of 1989.

From the Judgment and Order dated 17.2.1989 of the Gauhati High Court in F.A. No. 7 of 1972.

K.N. Bhatt, H.N. Salve, A.K. Sil and G. Joshi for the Appellant.

S. Parekh for the Respondent.

The Judgment of the Court was delivered by K. JAGANNATHA SHETTY, J. The question of law which is concerned in this appeal is whether in the circumstances of the case, the appellant ("Bank") was required to act as agent of the respondent or as bailee in respect of goods entrusted for delivery to the respondent against payment. In 1945 the respondent was carrying on the business of wholesome and retail dealership in textile yarn and cloth at Agartala and in the course of that business he was appointed as a Government nominee to indent for and lift the quantities of cloth and yarn to Agartala from different mills situated in Bengal, Bombay, Ahmedabad and other places. For the purpose of that business, the respondent had maintained Current Account No. 391 with the Agartala Branch of the United Commercial Bank Limited which has since been styled as 'UCO Bank', the appellant in this appeal. The case of the respondent-plaintiff was that there was an oral agreement with the Bank on September 2, 1950 under which the latter inter alia was to receive bills, documents and air receipts sent by or on behalf of the plaintiff from his agents or suppliers and would release and/or take delivery of goods sent by them, as and when the goods arrive at Agartala. The Bank would hold or keep the said goods stored in its godown for and on behalf of and on account of the plaintiff for his benefit etc. It was also alleged that payment of the bills in respect of goods dispatched to the Bank should be made by the plaintiff. He should be given delivery of the goods and air receipts by the Bank according to his convenience and requirement. It was further stated that under the said terms and conditions, the Banker constituted himself and acted as an express trustee and/or agent of the plaintiff in relation to the said goods and air receipts and thus stood in fiduciary relationship with the plaintiff.

Complaining non-delivery of goods even after receiving payment thereof, the plaintiff brought a suit for accounts, damages, compensation and delivery of goods or their equivalent in money valued at

Rs.2,68,198.97.

The Bank has denied all the allegations and asserted that it never acted as an agent, trustee or deposittee of the plaintiff in respect of the goods and documents. The existence of fiduciary relationship between the parties was also denied. It was however stated that certain parties from Calcutta were supplying goods to various parties in Agartala including the plaintiff and they used to send bills with air receipts covering the goods to the Bank for presentation to the drawees and the Bank would deliver the same against payment. The Bank collected bill amounts on behalf of those parties in the usual course of business. It was further admitted that some parties from Calcutta engaged the Bank to collect the amounts of the bills drawn on the plaintiff, to clear the goods dispatched by them from the Airways on their behalf, to store them in Bank's godown and to allow the drawee (plaintiff) to take delivery of the goods against payment of their costs and charges including the salaries of the godown staff, handling and insurance charges etc. Those charges and costs were recovered from the plaintiff by the Bank on behalf of the parties sending the goods to the plaintiff. The Bank maintained that it had dealt with such goods of the Calcutta parties, recovered monthly charges at the instructions of the drawers and the drawee (plaintiff) and debited to the account of the plaintiff. When there was no amount available in the plaintiff's account or when the plaintiff defaulted in retiring the bills, the said charges were recovered from the drawers. The goods in the custody of the Bank on behalf of the Calcutta parties which were paid for by the plaintiff would be delivered to the plaintiff and the goods for which no payment was made by the plaintiff would be returned to the drawers of the bills. The trial court framed among others, the following three issues:

(9) Was there any agreement and/or arrangements between the parties as alleged in the plaint?

10) Was the defendant a trustee and/or agent of the plaintiff as alleged in the plaint? and (11) Was there any fiduciary relationship between the parties as alleged by the plaintiff?

The trial court recorded findings on all these issues in the affirmative and in favour of the plaintiff. On Issue No. (9) as to the existence of agreement, it was observed:

"The evidence on record shows that regular accounts of goods for the plaintiff would be maintained by the defendant Bank. Although the purpose of current account No. 391 of the plaintiff cannot alter the nature being that of debtor and creditor attributable to the account, the factum of the account and its operation also indicate that there was an agreement between the parties. This does not however exclude necessary agreement or arrangement by the bank with the Calcutta parties. Debits in the account of the plaintiff started to be made from 13.9.50 in connection with transactions of the plaintiff, whereas the alleged agreement between the bank and S.T. Bros, occurred in March, 1951. All these factors lead to the inference that there was an agreement or arrangement between the bank and the plaintiff regarding payment of bills and charges for the account of the plaintiff and otherwise and

regarding storing of those goods received by the Bank in its godowns, of which the plaintiff came to be owner and for delivery of those goods as and when required by the plaintiff. These are the minimum terms deducible from the evidence on record. To this extent the issue is answered in favour of the plaintiff."

Issue No. (10) was determined as follows:

"It is in evidence that the Bank collected bills, made remittances to mills, applied for purchasing drafts on behalf of the plaintiff, met expenses of storing the goods by debiting account No. 391 of the plaintiff, collected treasury bills of the plaintiff and vide Ext. P-56 series made adjustment of bills by debiting account No. 391 without cheques issued by the plaintiff and did similar other works. All this leads to the reasonable inference that the bank also acted as agent of the plaintiff. In this suit, such agency of the defendant involved a relation of trust and confidence and the goods which came to be owned by the plaintiff on payment of value thereof and which remained in the hands of the bank were impressed with trust for the benefit of the plaintiff. As matter of fact, the defendant bank's position was that of an intermediary owing duties to both the Cal- cutta parties and the plaintiff."

Issue No. (11) as to the fiduciary relationship between the Bank and plaintiff, it was remarked:

"The bank collected cheques issued in its favour and under advice of the plaintiff remitted the money to the mills and the Calcutta parties to meet the value of the bills drawn by the mills and the agents of the plaintiff (Calcutta parties). It has to be noted in this connection that the Calcutta parties acted as agents of the plaintiff in so far as they acted on behalf of the plaintiff in lifting the controlled commodities from the mills and arranging for their dispatch to Agartala. The bank also made adjustment of bills by debiting account No. 391 without any cheques being issued by the plaintiff, vide Ext. P-56 series, and met the expenses of storing the goods by debiting from the account No. 391 of the plaintiff. From Ext. P-61, stock register, it is seen that the bank stocked goods on account of the plain- tiff in its godowns on those premises, according to the learned counsel for the plaintiff, there is no escape from the conclusion that the bank stood in a fiduciary relation- ship with the plaintiff. Learned counsel for the defendant bank urged that save and except relationship of banker and customer there was no other relationship between the plain- tiff and defendant bank. But in view of the materials on record I find that there was fiduciary relationship between the plaintiff and the defendant bank. This issue is decided in favour of the plaintiff."

Accordingly, the suit was decreed in part directing delivery of goods or the value equivalent to Rs.1,26,500. A Commis- sioner was also appointed to take accounts with regard to the transactions.

The High Court of Calcutta has affirmed the decree of the trial court. As to the question of relationship between the Bank and customer, the High Court observed:

"In our opinion if we find that the plaintiff paid the value of the goods and the appellant bank neither delivered the goods nor rendered accounts, a fiduciary relationship could exist between the plaintiff and the bank in respect of the goods for which value was paid by the plaintiff."

The Bank by obtaining leave has now appealed to this court. In opening the appeal, Counsel for the appellant urged that the case of the plaintiff based on oral agreement which is expressly contrary to banking transactions ought not to be relied upon. It was claimed that the Bank was a collecting agent for the supplier of goods and not an agent or trustee for the respondent. Adjustment of bills by debiting to the current account without cheques from the respondent would not change the ordinary relationship of bank and customer. There was no 'special relationship' created either by opening the current account or storing the goods meant for delivery to the plaintiff and there was nothing to take the parties outside the usual course of banking business. It was further argued that the Bank received and took charge of the goods only as bailee and any inference of fiduciary relationship between parties was unwarranted and unjustified.

Counsel for the appellant appears to be very particular to get rid of the finding recorded by the Courts below as to the fiduciary relationship in bank and customer relationship. We agree with him that the High Court and the trial court were not justified in holding that a fiduciary relationship could exist between the parties in respect of goods for which the suit claim was based. This inference was drawn primarily from the debit entries in the plaintiff's current account. Reference was made to collection of bills, remittances to mills, meeting expenses of storing the goods and debiting the same to the current account even without cheques from the plaintiff. These acts according to the trial court would lead to an inference that the Bank acted as agent of the plaintiff and there was thus fiduciary relationship between parties. But we do not find anything in this method of operation to take the parties outside the ordinary relationship of banker and customer. Lord Chorley says that "the main mass of daily banking activity in branch banks is concerned with the operations of current accounts which thus provide a sort of hub round which the wheels of the whole set up of commercial banking revolve There is no accepted definition of a current account; though in its normal form it is easily recognised in practice. The principal feature of such an account is the fact that the customer gets his money repaid from it, or any advances which he is receiving from his banker by way of loan: and this is so whether the repayment is to himself or to a third party. Normally the repayment is made through the machinery of the cheque and conversely unless otherwise indicated by the customer it is implied that cheques paid in are for the credit of the current account, and that they will be so credited We have seen that overdrawings by the customer when allowed by the banker are treated as loans.' They will be debited to the current account. Indeed it is through the current account, and by means of overdrafts on it that loans and advances are normally made by bankers to their customers". (Law of Banking by Lord Chorley 6th ed. at 167-168). In Paget's Law of Banking, 9th ed. at 82-83, it is stated that "the current or drawing account may be either a credit or an overdrawn account. A credit account is made up of moneys paid in by the customer, the proceeds of cheques and bills collected for him, coupons collected, interest and dividends paid direct to the banker and from various other sources, less any money properly paid out. Moneys from different sources, once they have found their way into the current account, are treated as one entire debt." This is the normal method of banking operation and the

maintenance of the current account in this case appears to be not outside this principle and therefore, no inference could be drawn that the Bank stood in fiduciary relationship with the plaintiff. Next question for consideration is whether the Bank acted as agent of the plaintiff in respect of the goods in question? Here also Counsel appears to be right in his submission. Banks take charge of goods, articles, securities as bailee and not as trustee or agent. Bailment is the delivery or transfer of possession of a chattel (or other item of personal property) with a specific mandate which requires the identical res either to be returned to the bailor or to be dealt with in a particular way by the bailee as per directions of the bailor. One important distinguishing feature between agency and bailment is that the bailee does not represent the bailor. He merely exercises, with the leave of the bailor (under contract or otherwise), certain powers of the bailor in respect of his property. Secondly, the bailee has no power to make contracts on the bailor's behalf; nor can he make the bailor liable, simply as bailor, for any acts he does. (See Fridman's Law of Agency 5th ed. p. 23). In the instant case, there is nothing to indicate that the Bank represented the Calcutta parties or the plaintiff with authority to change the contractual or legal relationship of parties and therefore, there is no justification to hold that the Bank acted as agent of the plaintiff.

But that however, does not mean that the Bank could succeed in this appeal. Having regard to the finding of fact recorded by the Courts below, it is immaterial whether the Bank acted as bailee or in any other capacity. On the evidence adduced by the parties it has been established that the plaintiff did pay the price of the goods in respect of which he based his claim in the suit. The Bank, however, took the plea that the goods were delivered to one Shishu Ranjan Sen, who was the authorised agent of the plaintiff. But at the relevant time the plaintiff had his own agent called Dhani Ram and he did not receive the goods. The Bank has neither examined Shishu Ranjan Sen nor Dhani Ram. The Bank examined one Dhawan (DW-2) to prove some initials of Shishu Ranjan Sen on certain documents but his evidence has not been accepted. The fact, therefore, remains that the Bank having received the price of the goods from the plaintiff has failed to deliver the same to him. This finding has not been seriously disputed and indeed cannot be disputed since the Bank having chosen not to call Shishu Ranjan Sen or Dhani Ram to give evidence. The evidence adduced by the Bank was thus insufficient to establish the factum of delivery of goods to the plaintiff. The banker bailee gratuitous or for reward is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. (See: Halsbury's Laws of England 4th ed. Vol. 3 para 93). In fact a paid bailee must use the greatest possible care and is expected to employ all precautions in respect of the goods deposited with him. If the property is not delivered to the true owner, the banker cannot avoid his liability in conversion. (See: (i) The Law Relating to Banking by T.G. Reeday 4th ed. p. 81; (ii) Law And Practice relating to Banking by F.E. Ferry 5th ed. p. 21). In the light of these principles the Bank could not avoid the liability to return the goods as agreed upon or to pay an equivalent amount to the plaintiff. Even if we assume that the goods were delivered to a wrong person, the Bank has to own the responsibility to pay the plaintiff. The liability of banker to customer in such a case is absolute even if no negligence is proved. In Halsbury's Laws of England (supra, para 94), it is stated "where the bank delivers the goods to the wrong person, whereby they are lost to the owner, the liability of the bank is absolute, though there is no element of negligence, as where delivery is obtained by means of an artfully forged order. In law the banker could contract out of this liability, but he would be unlikely to do so in practice."

Before parting with the case, we may also state that in practice, bankers do not set up the statute of limitations against their customers or their legal representatives, and we see no reason why this case should be an exception to that practice.

In the result, the appeal is dismissed with costs, but not for all the reasons stated by the trial court and the High Court.

N.P.V.
missed.

Appeal dis-