Karnataka High Court
Syndicate Bank vs Jaishree Industries And Others on 20 January, 1994
Equivalent citations: AIR 1994 Kant 315, ILR 1994 KAR 778, 1994 (1) KarLJ 482
Author: S Baht
Bench: K S Bhat, M Mirdhe
ORDER Shivashankar Baht J.

1. The first defendant in the suit is the appellant herein. The parties are referred to with reference to their rankings in the trial Court hereafter.

2. The plaintiff sued defendants for recovery of a sum of Rs. 3,19,000/- being the value of the draft for Rs. 2,51,125/- and certain interest thereon. It is stated in the plaint that the plaintiff is a partnership firm. The business of the plaintiff was of manufacturing and selling Super Enamelled Aluminium Winding Wires at Ahmednagar. The plaintiff firm requires aluminium coils for the purpose of its business. The third defendant approached the partners of the plaintiff firm stating that he is a recognised Government auctioneer attached to the Defence Department of Government of India and that third defendant told the said partners that a lot of aluminium coils weighing 24.5 tonnes were available at a floor price of Rs. 10.25 Ps. per Kg. at Bangalore. The third defendant was entitled to brokerage of 10% on entire deal. The third defendant persuaded the plaintiffs partners to believe that aluminium coils were available at Bangalore with M/s. Axle Conductor Industries Ltd. (hereinafter referred to as 'Ltd. concern') which according to the third defendant was a Government of India undertaking belonging to its Defence Department. The third defendant also persuaded the partners of the plaintiff firm to agree to purchase the available aluminium coils for a sum of Rs. 2,51,125/-. A draft was purchased by the partners of the firm at Ahmednagar payable to M/s. Axle Conductor Industries Ltd., at Bangalore. The draft was purchased from State Bank of India.

3. The two partners of the plaintiff-firm along with third defendant came to Bangalore and they reached Bangalore on 5-10-1979. They had purchased, as already noted, draft for a sum of Rs. 2,51,125/- on 3-10-1979. According to the plaintiff, the third defendant told the partners of the firm that an agreement shall have to be executed by them on Rs. 5/-stamp paper in favour of the Defence Director, Conductor Industries Ltd., Government Ordinance Factory Unit, AIR Craft Shed, Bangalore, and accordingly the agreement was prepared and the said agreement along with the bank draft was kept in an envelop bearing the alleged emblem of the said Ltd. concern. The envelop was closed by the third defendant, but instead of returning the said envelop he managed to handover a similar envelop to the partners which was not noticed by the said partners at that time. The partners were further told that the factory was under inspection and therefore the goods would be available only on 8-10-1979. The third defendant and the two partners went outside the Bangalore and returned on 8-10-1979, since 6th and 7th October were holidays being Saturday and Sunday.

4. On 8-10-1979 the third defendant seems to have made a telephonic call and then told these partners of the firm that the goods will be available only on 10-10-1979 as the factory was closed on the said date due to the demise of Jayaprakash Narayan. Accordingly the third defendant and the said partners went tot he transport office to book for the transportation of the consignment and thereafter on 10-10-1979 the third defendant left the two partners stating that he would meet them

at the office of the transport company at 4.00 p.m. so that all of them can proceed to the factory to collect the goods. In the meanwhile all of them had made arrangements for return journey to Ahmednagar and Hyderabad respectively. However on 10-10-1979 the partners or the plaintiff firm could not meet the third defendant even though they waited for him till late in the evening and only at the late hour in the evening they realised that the third defendant had absconded or was not traceable. On the next day i.e., on 11-10-1979 the partners went in search of the Axle Conductor Industries Ltd. and the Defence building but they could not find the location of these establishments. They realised that those establishments were not at the address stated by the third defendant. It is at that time they suspected the bona fides of the third defendant and opened the envelop with them and realised that the envelop did not contain the draft purchased at Ahmed-nagar and the envelop contained only a bank stamp paper of Rs. 5/- and another balnk paper. On further enquiries and investigations it was revealed that the draft had been collected through the first defendant-bank at its Indiranagar Branch, Bangalore. Subsequently it was also realised that the third defendant was suspected to have been guilty of similar cheating and the police department conveyed this information to the plaintiff-firm. It was further realised that account was opened on 10-9-1979 in the name of M/s. Axle Conductor Industries Ltd. by the Proprietor R. K. Vayas. The address of the Limited Concern given to the Bank was just opposite to the Bank's office. An introduction given to the Bank to open the account in the name of the Limited Concern was by one Mr. Nanjunde Gowda, who was having a small shop at the address given by the Limited Concern as its address. The partners also discovered that, while opening the account the name of the account holder was given as Axle Conductor Industries though the actual account was opened in the name of the Limited Concern. The application for opening the account was given as if it was a proprietary concern and therefore the Bank obviously did not seek the necessary information or held any enquiry as to the incorporation of the Limited Concern, its Memorandum of Assocation, etc. It was also found that the draft was deposited in the said account on 5-10-1979 and the first defendant-Bank collected the draft and credited the same to the aforesaid account on 9-10-1979. On the next day i.e. 10-10-1979 the money was withdrawn, as per the records. (However the evidence reveals that the money was actually received by the third defendant on 9-10-1979 itself after the office hours, as stated by the then manager of the bank in his evidence). According to the plaintiff the first defendant was negligent in opening the account and thereafter in proceeding to collect the amount payable under the draft and paying the same to the third defendant and therefore the first defendant was liable to make good the plaintiff the value of the draft. The second defendant is the State bank of India through whom the draft was purchased at Ahmednagar and it was paid at Bangalore.

5. The first defendant contended that it acted bona fide and the account was opened on the basis of the reference and the introduction given by its long standing customer referred in the plaint. According to the first defendant it was not liable to pay the value of the draft to the plaintiff because essentially the plaintiff was negligent in purchasing the draft in favour of the fictitious company. It is unnecessary to refer to other averments in the written statement. In the written statement, it was however stated that after opening the account a sum of Rs. 500/- was withdrawn by R. K. Vyas on 12-9-1979 out of the deposit of Rs. 1000/- made by him on 10-9-1979. Similarly another draft for Rs. 1000/- was deposited for collection on 11-9-1979 it was drawn on Central Bank of India favouring the Limited Concern. The said draft was also credited to the disputed account opened by the third

defendant in the name of the Limited Concern. However, in para 8 of the written statement there is a clear statement that the account was opened in the name of Axle Conductor Industries and in the form prescribed for opening the accounts of proprietorship concern R. K. Vyas described himself as proprietor of the said Axle Conductor Industries. It is further stated in the account opening form that he would be opening a factory very soon. According to the first defendant, since the account was opened in the name of a proprietary concern there was no negligence on the part of the first defendant. Similarly in the specimen signature card the third defendant had signed and there was nothing to show that the account was opened in the name of Limited Company. It is asserted in the written statement that the defendant appears to have clandestinely put the seal on the specimen signature card and on the basis of this misrepresentation of the fact the concerned clerk added the word 'Limited' in the register of the bank in good faith. It is also contended that the opening of the account and the depositing the draft in question were not part of one scheme and one transaction. The first defendant asserts that the draft in question was a genuine draft and there was no suspicious circumstance and there was no connection between the opening of the account and the collection of the draft and there was no reason to doubt the title of the third defendant to the draft. It is further asserted that the Bank acted in good faith and it was acting as an agent in the collection of the draft which was in the name of the Limited Concern. However, the third defendant was the holder of the draft and the first defendant-Bank assumed that the third defendant was the owner of the draft. There is also a mild accusation in the written statement that the plaintiff and the third defendant joined hands and brought about the transaction to deceive the first defendant. But this allegation was not pursued and it is unencessary to refer to the allegation again. According to the Bank the third defendant became the owner of the draft and therefore the third defendant was entitled to the amount under the said draft.

6. The trial Court framed the following issues :

"1. Whether the plaintiff proves that the plaintiff is a registered partnership firm under the Indian Partnership Act and that the person signed as a partner is shown as a partner ?

2. Whether the plaintiff proves that the 3rd defendant introduced himself as S. L. Walia to the plaintiff as recognised Government Auctioneer attached to the Defence Department?

3. Whether the plaintiff proves that the 3rd defendant misrepresented and committed an act of fraud to purchase a demand draft for Rs. 2,51,125/- as alleged in para-3 of the plaint ?

4. Whether the plaintiff proves that on 5-10-1979 the 3rd defendant committed fraud and got exchanged the envelop containing bank draft ?

5. Does the 1st defendant prove that they have taken proper care while opening the bank account in the name of Axle Conductor Industries Limited by Proprietor R. K. Vayas?

6. Does the 1st defendant prove that they have taken and complied with requisite procedure and compliance in making payment of Rs. 2,50,000/- to R. K. Vayas ?

7. Whether the 1st defendant proves that they had acted in good faith as collecting bankers and payment was made to 3rd defendant in due course in accordance with the apparenttenor of the instrument?

8. Does the plaintiff prove that the plaintiff sustained loss of Rs. 2,51,125/- due to wrongful payment by the first defendant?

9. Whether the plaintiff has no cause of action to maintain the suit?

10. Whether the palintiff has a prima facie cause of action to maintian the suit?

11. Whether the plaintiff is entitled to claim compensation against the 1st defendant?

12. Whether the 1st defendant proves that there was a conspiracy between the plaintiff and 3rd defendant as alleged in their written statement?

13 Whether the plaintiff is entitled for grant of reliefs as prayed for?

14 Whether the 1st defendnat proves that the 3rd defendant got clandestinely added the word 'Limited' in bank's registers?

15 Whether the plaintiff has no right to maintain the suit as having purchased the draft in the name of 3rd defendant and handed over the same to 3rd defendant?

16 What order or decree?"

7. Ultimately the trial Court held that the Bank was negligent in opening the account and in collecting the draft and making the payment to the third defendant and since the first defendant failed to take due care while opening the account and making the payment the first defendant is liable to pay the value of the draft to the plaintiff to whom the money actually belongs. A decree for a sum of Rs. 3,19,000/- with interest at 6% per annum on Rs. 2,51,125/- from the date of the suit till the date of realisation came to be made. Hence this appeal by the first defendant.

8. Having regard to the respective contentions the short question for consideration is whether the first defendant acted negligently and whether first defendant is entitled to seek protection under Section 131 of the Negotiable Instruments Act.

9. Before discussing the legal principles we prefer to refer to several facts revealed from several documents and the evidence of the first defendant. We have adopted this approach because the question of negligence is essentially one of fact,

10. Ex. P1 is a visitng card of R.K. Vayas, Managing Director, Axle Conductor Industries Ltd. This card was found in the Bank ledger of the first defendant relating to the disputed account. Similarly another visitng card found from the same ledger is marked as Ex. P27. Here the visiting card bears

the name of R.K. Vayas, Proprietor, Axle Conductor Industries Ltd. There is also a statement in this visiting card that one unit would be shortly started in Bangalore, without giving the address. It refers to a factory at Bombay and the office also at Bombay. The peculiar feature is that while in one the third defendant is described as Managing Director, in another he was described as proprietor of the same Limited Cocern. In both the address given is the same. Ex. P2 discloses the specimen of rubber stamp of "Axle Conductor Industries Ltd., Properitor". Ex. P3 is a letter signed by . R.K. Vayas in the printed form of the first defendant-Bank bearing nomenclature 'Letter of Proprietorship (for an individual trading under a trade name)'. On 10-9-1979 the third defendant signed this and it is addressed to the Indira Nagar Branch of the first defendant-Bank. However, at the top the third defendant described himself as proprietor, Axle Conductur Industries Ltd., Bangalore. The printed form required the declaration that the signatory is the proprietor of the concern referred to in the letter. Ex. P4 is the printed form under which a request may be made to open the account on behalf of a limited company. In this there should be a declaration that the name of the limited company should be given with the registered office. There should be enclosed to this letter, certificate of incorporation which would be returned after inspection. Similarly there should be a copy of the memorandum and articles of association, a certificate of the Registrar of Companies that the company is entitled to commence business and a certified copy of the resolution of Board of Directors regulating the conduct of the account with the specimens of the signatures of the authorised signatories. Admittedly this form was not resorted to in the instant case.

11. Ex. P5 is the blank form similar to that of Ex. P3. Ex. P6 contains the specimen signatures of R.K. Vayas wherein it is stated that the name and style of account will be the Limited Concern. There is a clear writing that the account will be in the name of Axle Conductor Industries Ltd. But, in the column relating to the constitution it is stated "Proprietorship".

12. Ex. P7 discloses that the account holder was introduced by Nanjundegowda. The name of the person in whose name the account is to be opened is given as Axle Conductor Industries and the occupation is given as business and the address is given as Trimal Store, Door No. 836, 1st stage, Indira Nagar, Bangalore-38 (admittedly this was the address of Nanjunde Gowda located just opposite of the first defendant--Bank in question). At the top of this Ex. P7 it is stated that a sum of Rs. 1,000/- was paid as deposit and it was signed by R.K. Vayas, Proprietor and then the seal of the Limited Concern is affixed.

13. Ex. P8 is a self-cheque for Rs. 500/-drawn by the Limited Concern but signed by the third defendant as proprietor. The seal of the Limited Concern and the word 'Proprietor' are affixed obviously with the purported seal of the company.

14. Ex. P9 is another self-cheque dated 9-10-1979 for Rs. 2,50,000/-. The cheque is signed again by R.K. Vayas as proprietor of the Limited Cocnern.

15. Ex. P10 is a statement of account showing that on 10-9-1979 a sum of Rs. 1000/- was deposited, the account is found to be in the name of the Limited Concern. On 12-9-1979 by self-cheque Rs. 500/- was withdrawn and on 9-10-1979 a sum of Rs. 2,50,000/- was withdrawn. In the meanwhile there were one deposit of Rs. 1000/- and another deposit of Rupees 2,51, 125/- on 9-10-1979. Ex.

P10 shows that on withdrawal side there are only two withdrawals, one of Rs. 500/- and another of Rs. 2,50,000/-. On the deposit side there are three entries, one of Rs. 1,000/- again one of Rs. 1000/- and the third is of Rs. 2,51,125/-

16. Ex. P11 is a letter signed by the Superintendent of Police, C.O.D., Bangalore dated 5-12-1980 enclosing the copy of the photographs of third defendant who was suspected having involved in a cheating case in the name of Shivamohan Sharma. The other documents need not be referred to except Ex. P19(A), the original draft in question. It is clear that the draft was drawn as payable to the Limited Concern. The order was to the State Bank of India, Bangalore, to make the payment. It was crossed and it was "account payee". On the reverse of the draft there is an endorsement as follows:

"Received Payment Thru Bangalore Clearing House Payee's Account Credited Syndicate Bank, Indiranagar Branch, Bangalore."

17. Ex. P35 is the Pay-in-slip/Challan through which the draft in question was given to the first defendant Bank for collection. This gives the name of the Limited Concern.

18. Ex. P36 pertains to the deposit made on 10-9-1979 while opening the account. This Ex. P36 also bears the name of the Limited Concern who paid the cash.

19. Ex. P37 pertains to the deposit made on 11-9-1979 under which a draft was given for collection.

20. The first defendant examined its Branch Manager who was functioning as such during the relevant period as D.W. 1 D.W. 1 states that one R.K. Vayas came to his chamber with one of the clerks of the Bank at the time when D.W. 1 was very busy in his chamber and that the Bank had very good business at that time. The said Vayas wanted to open an account as a Proprietor of Axle Conductor Industries. D.W. 1 asked his clerk to obtain a letter of properietorship to open an account, this was Ex. P3. D.W. 1 speaks to the details of other documents which we have already referred to such as the specimen signature and statement of accounts, etc. According to D.W. 1, the said Vayas had not written that it was a Limited Company but had written as Proprietory Concern and the word 'Ltd.' was not clearly visible in Ex. P3. However he says that Exs. P3 and P7 were sent to him together after 10 days and D.W. 1 signed all the forms in connection with this transaction after several days.

21. The statement of D.W. 1 that the word 'Ltd.' was not clearly visible is not correct. We find the following writings very legible and are clearly visible:

"R.K. Vayas, Proprietor, Axle Conductor Industries Ltd., Bangalore."

May be in the body of the letter of proprietorship the word 'Ltd.' is not clear but in the top where the address of the proprietor is given it is very clear. Anyhow this is a minor aspect of the question because we have already noted that the word 'Ltd.' is found in Ex. P6, the specimen signature form and other various documents. According to D.W. 1 he had not seen the visiting card of the third defendant earlier and it was found in the ledger. D.W. 1 states that on 9-10-1979 the amount of Rs.

2,50,000/- was paid to Vayas, and that at about 3.00 p.m. when D.W. 1 was at his house for lunch he received a phone call from one Arjundas Nehru, Asst. Manager of the Branch, informing D.W. 1 that Vayas wanted the proceeds of the draft and that there was no sufficient cash in the branch and even in the nearby branch sufficient cash was not available; therefore Arjundas had rang up the currency chest at Gandhinagar and learnt that account was closed for the day and they cannot reopen it. The Deputy Manager refused to give any instruction to open to the said currency chest because it was controlled by Reserve Bank of India. Thereafter, Arjundas contacted Gandhinagar Branch of the first defendant-Bank who promised to oblige if he could reach Gandhinagar before 4.00 p.m. D.W. 1 thereafter went to his branch where inspection was going on. The cheque, if cleared, would reach the branch only at 4.30 p.m. till then whether the cheque had been cleared or not would not be known. However, as instructed by the Inspector of the Bank, D.W. 1 went to Gandhinagar main branch along with the party (third defendant) to ascertain whether the draft was cleared and then to make payments in that branch. D.W. 1 reached Gandhinagar branch before 4.00 p.m. with third defendant, from there he ascertained from Arjundas about the clearance of the draft and also the self-cheque issued by the third defendant for encashment. Arjundas Nehru told D.W. 1 that the draft was cleared and the cheque was in order. D.W. 1 made the payment and then returned to his branch at 4.45 p.m. At about 7.30 p.m. the concerned clerk in the office told D.W. 1 that the cheque bears the seal 'Ltd.' and 'Proprietor' and it cannot be correct (the said cheque is Ex. P9). D.W. I then states "as I had to pass the cheque before he makes payment I signed Ex. P9 even after he told me. As I had to leave Bangalore same night, I instructed my office to ascertain from the party regarding this mistake and carry out necessary corrections.....". On the next day at about 5.30 p.m. D.W. I was told over the phone by the Divisional Manager of the Bank about the fraud. Till Divisional Manager told D.W. 1 that the account was in the name of a Limited Concern D.W. 1 was not aware of it, as what he deposed.

22. D.W. 1 further states that Vayas became the customer of the Bank since he opened the account and that D.W.1 collected the demand draft in good faith and there was no negligence on his part. It is unnecessary to refer to anything else in this deposition in view of the categorical admission on the on the part of D.W. I that the account was found to be in the name of Limited concern and the cheque also was in the name of the Limited Concern but signed by the person calling himself as the Proprietor. D.W. 1 also admitted that in the ledger, the account stood in the name of the Limited Concern. D.W. 1 also admitted that he took R.K. Vayas to the main branch of the Bank to make the payment even without seeing the cheque, which was issued for Rs. 2,50,000/- on the afternoon of 9-10-1987. Quite strangely D.W. 1 states that he did not make any enquiry to find out the whereabouts of the third defendant with Nanjundegowda (the person who introduced the account) even after D.W. 1 came to know these facts.

23. We have referred to several docu-

ments. When an account is to be opened in the name of a Limited Company the request will have to be in a form with certain particulars as to the certificate of registration, commencement of the business, resolution of the Board authorising the opening of the account and operating the account, etc. Admittedly this procedure was not followed. The account was opened as if it was aproprietory concern. The staff of the first defendant-Bank did not bestow sufficient care even to notice the word

'Ltd.' on several occasions, such as at the time of opening of the account, at the time certain amounts were withdrawn by issuing a self-cheque and similarly while the final cheque was also issued in the name of the Ltd., concern but signed by a person also its proprietor. Having accepted the application, as if it was an application by a proprietor concern, quite strangely the bank allowed the account to operate in the name of the Limited concern.

24. The lack of care on the part of the bank pervades the entire transaction. It is quite patent according to the facts which we have already narrated.

25. In Marfani & Co. Ltd. v. Midland Bank Ltd. (1968) 2 All ER 573, Court of Appeal was considering the scope of a provision similar to Sec. 131 of the Negotiable Instruments Act. Kureshy was an employee of Marfani. Kureshy calling himself as Eliasade, cultivated Ali, for sometime. In the mean-whilel Marfani issued a cheque in favour of a firm called Elaszade and handed it over to Kureshy on 17th January. On 24th January, Kuresh opened an account in the respondent Bank, giving his name as Eliaszade; while opening the account he gave Ali's name as a reference who was an old customer of the Bank; he also gave one more reference. Bank open the account; Ali responded to the reference made to him by the Bank and gave a favourable reply, though the other persons to whom reference was made did not reply. Kureshy presented the cheque drawn in favour of Eliaszade for collection through the newly opened account and subsequently collected the amount. Question was whether the Bank was negligent. Court of Appeal held that the Bank was not negligent and that having regard to the prevailing banking practice, enquiry with Ali was sufficient for the Bank to admit Kureshy as a customer, believing him to be Eliaszade. The Court of Appeal held that the strict liability of the Bank to the real owner of the cheque, at common law, was to some extent modified by the statute and if the Bank was not negligent in opening the account and collecting the cheque, Bank cannot be made liable to the true owner. In this connection Diplock, L.J., observed at p. 579:

"Where the customer is in possession of the cheque at the time of delivery for collection, and appears on the face of it to be the 'holder', i.e., the payee or endorsee or the bearer, the banker is, in my view, entitled to assume that the customer is the owner of the cheque unless there are facts which are known, or ought to be known, to the banker which would cause a reasonable banker to suspect that the customer is not the true owner.

What facts ought to be known to the banker, i.e., what inquiries he should make and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend on current banking practice, and change as that practice changes. Cases decided thirty years ago, when the use by the general public of the banking facilities was much less widespread, may not be a reliable guide to what the duty of a careful banker, in relation to inquiries and as to facts which should give rise to suspicion, is today.

The duty of care owned by the banker to the true owner of the cheque does not arise until the cheque is delivered to him by his customer. It is then, and then only, that any duty to make inquiries can arise. Any antecedent inquiries that he has made are relevant only in so far as they have already brought to ascertain about his customers before accepting for collection the cheque which is the

subject-matter of the action, and so have relieved him of any need to ascertain them again when the cheque which is the subject-matter of the action is delivered to him. What the court has to do is to look at all the circumstances at the time of the acts complained of, and to ask itself were those circumstances such as would cause a reasonable banker possessed of such information about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque."

It was indicated in the opinion of the learned Judge that an undue suspicion about the customer is not called for, it was also held that,--

"the relevant time for determining whether the banker has complied with his duty of care towards the true owner of the cheque is .....the time at which the banker pays out the proceeds of the cheque to his customer, and so deprives the true owner of the right to follow the money with the banker's hands."

26. It is necessary to note the particular facts of the above case. Bank had no reason to suspect that Kureshy was not Eliaszade, and Bank's longstanding customer had introduced Kureshy as Eliaszade and cheque was drawn in favour of Eliaszade. When the cheque was presented for allocation, no further enquiry was called for in respect of (he said cheque. In opening the account, the then current banking practice was fully satisfied. There was nothing in the circumstances, requiring the bank to know any other facts. The known facts were such that they could not evoke any suspicion.

27. The Court of Appeal also pointed out that there cannot be a permanent guiding test to find out the nature of the inquiries to be made by the Bank and the tests applied at a time when banking practices were much less widespread may not be applicable to govern all future situations.

28. In India, there has been vast developments in the banking sector. With the growth of industry and commerce, people are compelled to lean on the banking services. Vast multitude of salaried sections necessarily rely on the banking facilities. Villages, artisans, small traders are not exceptions to this coverage. An efficient and prompt banking service has become an imperative necessity for all. The approach to the nature of inquiries to be made by the Bank and the care to be taken, while dealing with the monetary transactions of the customers are to be considered, not merely by the increased load of work borne by the Bank, but by the requirement of maintaining an efficient and reliable service by the Banks to those who are compelled to avail of the banking services.

29. It is not a proper defence against negligent driving, that the person driving the vehicle was in a great hurry to reach his destination or that, the driver was strained by excessive work.

30. Those who engage themselves in any profession or employment, which has a direct impact on the life of others (members of the public), owe a duty to take sufficient care while functioning in their chosen field, so that, others who resort to the said field to avail of the services rendered in the field are not exposed to any unforseen loss or injury.

31. It is a normal feature of the present day to obtain a draft when large amounts are to be paid; wherever cheques are accepted, they are drawn and issued. These are made 'account payee' to ensure that payees atone encash them. Therefore, Banks have a great responsibility while opening new accounts by unfamiliar persons. Opening of a bank account cannot be equated to a routine activity, even by the bank.

32. If at the time of opening the account and subsequently while the account is being operated, any conduct of the customer in relation to the account is sufficient to evoke suspicion of the account holder's credibility or of his activity, bank shall have to be alert to the situation and take remedial steps immediately. The duty and care to be taken by the Bank do not stop at the opening of the account by a person. The duty and care required of a bank runs through every operation affecting the said account; each time, an account payee cheque or a draft is presented, the Bank owes a duty to see whether there is any inherent defect in the instrument or in the manner in which it is sought to be credited for collection. Draft drawn as payable to "Ms. Rama" cannot be collected for and credited to the account of Mr, Rama without noticing the difference, solely on the ground that the Bank was busy in dealing with several customers when the said instrument was given for collection or subsequently and it cannot be a valid defence for the Bank, that, on earlier occasions also similar cheques or drafts had been accepted and amounts had been credited to Mr. Rama's account, even though, in the instruments, payee was Ms. Rama. In such a situation, the fact that the Bank acted in good faith is entirely irrelevant. Lack of good faith is not the same as being negligent; two are different concepts altogether. An utterly negligent person, acting negligently can be said to be acting in good faith; still, he would be answerable to the consequences of his negligence.

33. No test can be evolved to identify 'negligence' governing all situations. It has to be inferred from the particular facts of the case. ' In Commissioners of Taxation v. English, Scottish and Australian Bank Limited, AIR 1920 PC 88 bearer cheques deposited in the office of the Commissioners of Taxation, were stolen by a clerk, who opened a new account and collected the proceeds of the cheques. The Privy Council held that the new account holder became the customer of the Bank (even though, account was recently opened), since, duration of the relationship if banker and customer is not of (he essence of the relationship. Question was whether the bank was negligent in 'collecting the cheque'; it was 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 of whether there was negligence in collecting a cheque". The Privy Council approved the tests applied by the High Court of Australia. The High Court had held that "the question should in strictness be determined separately with regard to each cheque". Another test was modified by the Privy Council to read as:

"the test of negligence is whether the transaction of paying in any given cheque, complied with the circumstances antecedent and present, was also out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused them to make inquiry."

(Words, 'coupled with the circumstances antecedent and present' were inserted by the Privy Council).

Thereafter the Privy Council pointed out that the question is necessarily a question of fact and the standard of care to be taken by the bank must be the standard to be derived from the ordinary practice of bankers, not individuals. While applying the above to the instant case before us, following facts are to be noted:

(i) Account was started, as having been opened in the name of a proprietory concern, but, somehow the word 'Ltd.', was inserted subsequently. However, fact remains that the account purported to be in the name of "M/s. Axle Conductor Industries Ltd., by Proprietor R.K. Vayas". .

(ii) A few cheques or drafts credited to the said account were drawn in favour of the saidd 'Ltd.', concern. Monies were drawn by the 'Ltd.', concern, signed by R.K. Vayas' as Proprietor of the 'Ltd.', concern. On the cheque the seal of 'Ltd.', concern was affixed, and the R.K. Vayas signed as the proprietor.

(iii) Draft in question was crossed and was account payee, payable to the 'Ltd.', concern, it was credited for collection through a challan bearing the seal of 'Ltd.,' concern.

(iv) Amount was drawn, by issuing the cheque signed by R.K. Vayas as 'Proprietor' below the seal of 'Ltd.,' concern.

(v) Bank officials are expected to know that a 'Limited company' cannot be the proprie-tory concern of any individual.

34. Each time a cheque or a draft drawn in favour of the said 'Ltd.', concern was credited for collection, the bank owed a duty to see whether the said 'Ltd.,' concern was a customer. If only the bank had noticed the anomaly in the description of the customer as a 'Ltd.,' concern by 'Proprietor' R.K. Vayas, it would have aroused doubt as to the suspicious character of the account and doubt as to the manner in which it is being operated with regard to the particular account payee cheque or the draft. By closing the eyes to the discrepancy and the anomalous nature of the account and the manner in which the cheque or the draft was sought to be collected, bank cannot plead that it was not negligent.

35. Circumstances are such that they should have normally aroused doubts in the bank's mind and caused (hem to make enquiry as to the account holder and as to the real authority of the person to collect the amounts payable under the account payee draft.

36. In Commercial Banking Company of Sydney, Ltd. v. Mann, (1960) 3 All ER 482 the person who drew the relevant instrument to obtain an order of the bank for payment, had the authority to do so. The said person (Richardson) obtained bearer cheques from the bank where his firm had the accounts and then the cheques were presented in another bank and amounts were realised. In the circumstances, payments were upheld and the bank was held not liable to the respondent firm; Richardson may be liable but not the bank.

37. If the partner exceeded his authority while issuing cheques to the firm's bank and the said limited authority of the partner was not and could not be known to the bank, bank cannot be held guilty of any negligence so as to make it liable for conversion. Facts of the above case are entirely different and bear no anology to the facts of the case before us.

38. Need to hold proper inquiry by a bank before an account is opened and then not to act negligently while accepting the cheques for collection or payments, was also pointed out by the House of Lords in Lloyds Bank, Ltd. v. E.B. savory and Company, (1933) AC 201. After referring to S. 82 of the English Act (similar to S. 131 of our Act), which was stated to be a concession, Lord Wright observed, at p. 229:

"As it is for the banker to show that he is entitled to this defence the onus is on him to disprove negligence. And just as in an action in conversion it is an immaterial averment that the conversion was only possible because of want of ordinary prudence on the part of the true owner, so that averment is equally immaterial if the issue arises under S. 82."

While accepting the cheque (or draft) for collection, the banker acts as a mere agent in the collection of the cheque and not on his own account as holder and the person for whom the banker acts must be bank's customer are two of the four conditions to be satisfied by the bank seeking immunity under Section 131 of the Act.

39. In Kanyalal Thakurdas Bankers, Carrying on Business at No. 32, Audiappap Naicken Street, Madras-1 v. The Bombay Cycle Importing Company, Cycle Dealers, Carrying on Business at 7, Broadway, Madras-1 [(1972) 3 MLJ 412] at p. 414 it is stated:

"The conditions are (a) that the banker should act in good faith and without negligence in receiving payment, i.e. in the process of collection, (b) that the banker should receive payment for a customer, i.e. act of mere agent in the collection of the cheque, and not on his account as 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 specially to himself."

40. The learned counsel for the appellant bank contended that the bank owed no duty to the plaintiff as the plaintiff was not its customer and there was no contractual obligation between the plaintiff and the present appellant which was only a collecting banker. We find that the proposition relied upon by Sri Sunddaraswamy is subject to qualification. In the above decision of Madas High Court the Bench pointed out at p. 415:

"It would be futile to try and formulate particular conditions or circumstances which might or might not establish negligence in this connection. Probably speaking, the banker must exercise the same care and forethought in the interests of the true owner, with retard to cheques paid by customers as a reasonable businessman would bring to bear on similar business of his own."

41. The bank cannot ignore the stand point of the true owner, while considering its duty to be diligent.

42. If the draft is drawn in favour of a fictitious person, it cannot be said that the ownership stood transferred to a non-existent person, for the purpose of examining the question whether Bank as a collecting banker acted negligently or not. Failure of the bank in realising the impossibility of a Limited company having a proprietor and then opening an account in the name of such a Limited company by its proprietor is the root of the negligence in the instant case. It is impossible for anyone to encash an account payee cheque/draft, without the payee's account in a bank; If so, bank owed a duty to be careful while opening an account in the name of a Limited company purporting to act through its proprietor, not only the account was opened, the bank closed its eyes to the strange cheques credited or withdrawn in the name of the some 'Limited' company by its 'proprietor' -- strangeness lies in the manner in which the payee or the drawee was described throughout.

43. Mr. Sundaraswamy contended that there was no connection between the opening of the account by the third defendant and the encashment of the draft, and that the opening of the account was a month prior to the encashment; the third .defendant met the partners of the plaintiff's firm on 3-10-1979 at Ahmednagar, while, the account had been opened at Bangalore on 10-9-1979.

44. Connection between the opening of the account and the operation of the account result in the encashment of a draft does not depend upon the intention'of the person to defraud a particular person at the time of opening of the account. It is obvious that the 3rd defendant had a scheme in his mind to use the bank account to encash the draft or cheques received by him in the name of the Limited concern, even when he opened his account; at that time he may not have the remotest idea as to who would his next victim. The connection between the opening of the account and the encashment of the draft is established, by the very fact that, but for the opening of the account in the particular manner it was opened (in the name of the Limited concern), the account payee draft could not be have been encashed. It is in this light the observations of the Madras High Court in Bharat Bank Ltd., Madras v. Kishin Chand Chellaram, shall have to be understood. Speaking for the Bench, Venkatarama Aiyar, J., observed, at p. 405:

"The position in law may thus be summarised: When in an action in conversion a defence is raised under S. 131 Negotiable Instruments Act, the primary question for determination is whether in the matter of realisation of cheque the collecting Bank had acted without negligence -- negligence not merely at the stage of encashment but at the prior stages from the receipt of the cheque in question.

The question whether the Bank had acted with negligence in the opening of the account will, however, be relevant under S. 131 to this extent that if the opening of the account and the deposit of the cheque are really part of one scheme, as where the account itself is opened with the cheque in question, or whether it is put into the account so shortly after the opening of the account as to lead to the inference that it is part of it, then negligence in the matter of opening the account must be treated as negligence in the matter of realisation of the cheque.

It might happen that even when a account is opened without a prior enquiry it might continue to be operated upon satisfactorily for some time but long afterwards a cheque might be put into the account which might turn out to be forged. In such a case it cannot be laid down as an inexorable rule that negligence in the opening of an account must be treated as negligence in the receipt of the

amount of the cheque. In all the decisions in which negligence in opening the account was held to preclude a defence under S. 82 of the English Act, the opening of the account and the deposit of the cheque were contem-' poraneous or so close in point of time as to be regard as one transaction."

45. The next passage makes the position further clear and the learned Judge stated, after referring to English, Scottish and Australian Bank Ltd., case AIR 1920 PC 88 that:

"The question would then be one of fact as to how for the two stages can be regarded as so intimately associated as to the considered as one transaction."

Bank cannot plead as a defence that it was busy and its staff was overloaded with the work.

"It is no defence for a bank to say that they were so busy and had a small staff that they could not make enquiries. If they could not make enquires when necessary, they must take the consequences."

(vide: Crumplin v. London 'oint Stock Bank -- (1913) 30 TLR 99, quoted by Partha-sarathy in his book cheques, in Law and Practice, 1972 Edn. page 349).

The same learned author refers to another English decision, at page 348 -- Ross v. London, Country, Westminster and Parr's Bank Ltd., (1919) 1 KB 678, wherein it was stated;

"I must attribute to the cashiers and clerks of the defendants the degree of inteligence and care ordinarily required of persons in their position to fit them for the discharge of their duties. It is therefore necessary to consider whether a bank cashier of ordinary intelligence and care on having these cheques presented to him by a private customer of the bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them."

46. Two alternative arguments were pressed into service, on behalf of the bank. It was argued that the owner of the draft was the third defendant and therefore payment to him was a perfect defence available to the bank.

47. We do not think so. The draft was drawn in favour of the Limited concern; that fictitious 'Ltd.,' concern was the owner of the draft, if at all and not the 3rd defendant.

48. Then it was contended that, a draft drawn as payable to a fictitious person is the same as a bearer cheque, even though it was crossed as "account payee".

49. The practice of crediting the account payee cheques only to the account of the named payee has come to stay; no bank accepts an account payee cheque or a draft for collection, unless it is presented by the particular account holder in whose favour the cheque/draft is drawn. The contention is based on the provisions of S. 7 of Bill of Exchange Act in England, which provided that such bills drawn in which the payee is fictitious, may be treated as bills payable to bearer. In this contrary, there is no such provision. Therefore, while examining a particular set of facts before us, we need not engage in any exercise to consider the legal implication of the above provision.

50. Theoretically, if the payee is a fictitious person, ownership of the money cannot pass on to someoneelse, other than the true owner. To what extent a person drawing a cheque or obtaining a draft in favour of a fictitious person would lose the ownership in ' favour of a bona fide "holder in course" need not be considered here. In the instant case, it is the negligence of the bank in opening the account and its negligence in allowing it be operated for encashment of the cross drafts drawn in favour of the Limited concern, by the third defendant as the 'proprietor' of the Limited concern, that has resulted in conversion of funds belonging to the" plaintiff. Question is whether the bank is entitled to the protection of Section 131 of the Act.

51. To summarise the facts:

(i) The first defendant bank opened the account in the name of a Limited company by its proprietor (the third defendant). The yery nomenclature of the applicant to open the application read with the statement that it is represented by its proprietor should have caused the bank to stop and examine the applicant's credintials.

(ii) Even if the original application was in the name of the concern by its proprietor, as if it is a proprietory concern, the actual opening of the account in the name of the 'Limited concern' by its proprietor was a negligent act.

(iii) When a crossed, account payee draft payable to the 'Limhed' concern was presented for collection, before proceeding to collect the amount, the banks should have taken care to see the account "and realised" the anamolous description of the account holder.

(iv) The self cheque given to withdraw the-amounts from the account, was by the Limited concern "by its proprietor," which again should have evoked suspicion in the bank as to the peculiar nature and personality of the account holder; an enquiry should have been held, even at that stage.

(v) But for the negligence of the bank, the draft purchased by the plaintiff in the name of the 'Limited concern' could not have been encashed at all by the third defendant.

(vi) The evidence of the manager of the first defendant clearly shows that, be acted in great haste and exhibited undue interest in obtaining the cash from another branch of the bank for disbursement to the third defendant, even beyond the office hours and the payment made to third defendant on 9-10-1979 was entered in the accounts as on 10-10-1979 and by that time the clerk of the branch had noted the peculiar feature of the cheque being issued by a Limited concern by its proprietor and had conveyed his opinion to the said manager. Even then, no immediate step was taken to trace the third defendant.

52. The first defendant bank acted without taking any care; it was throughout negligent with regard to the relevant facts of this case and it is not entitled to the protection of Section 131 of the Act.

53. The fact that partners of the plaintiff firm were also negligent in purchasing the draft even before verifying the existence of the 'Limited concern' and the availability of the goods which they wanted

to buy, is entirely irrelevant while considering the liability of the first defendant bank.

54. Appeal is dismissed. Decree of the trial court is affirmed. As a price for the gullibility of the partners of the plaintiff firm, we deny the plaintiff the costs of this appeal. No order as to costs in this appeal. Trial court decree is affirmed in all respects.

55. Appeal dismissed.