Judgements Section

CLIPS FROM JUDGEMENTS IN CASES BY OR AGAINST THE RESERVE BANK

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I. Appointment

1. High Court of Judicature at Bombay, Nagpur Bench-Writ Petition No. 1132 of 1996- Pravin M. Khaparde vs. Reserve Bank of India (2) Writ Petition No. 3270 of 1997 - Sudhir Gopikishan Soni vs. Reserve Bank of India -Decided on 15th September 1998 by Hon'ble Mr. Justice J.N. Patel and Hon'ble Mr. Justice D.D. Sinha

Facts

Bank issued an advertisement inviting applications from eligible candidates for inclusion of their names in the waiting list for twelve posts of part-time Encoder Operators in Bank's Nagpur Office. After written test and interview, petitioners were advised by the Bank vide letter dated 7-2-1990 about inclusion of their names in the waiting list. It was clearly mentioned in the Bank's advice that the waiting list was current up to 7-1-1991. It was also made clear that mere inclusion of the petitioners' names in the waiting list did not confer any right on them to claim appointment in the Bank. The currency of the waiting list was extended from time to time. The waiting list ultimately lapsed on 30th May 1995. Till then six candidates from the waiting list were appointed by the Bank as part-time Encoder Operator. The petitioners were out of the six remaining candidates who claimed appointment in view of their selection as Encoder operators. The Bank refused to appoint them in the service as Bank did not require Encoder Operators any more. Even the candidates appointed earlier as part-time Encoder Operators were absorbed in the Bank by offering them full time post of machine operators on humanitarian ground, in the light of the settlement by the Bank entered into on 31-1-1992 with recognised trade union. As such, there was no vacancy available for offering employment to the petitioners. The petitioners were advised that the waiting list had already been cancelled on 30-6-1995. The petitioners filed writ petition in the High Court challenging the Bank's decision refusing them offer of appointment. Bank opposed the writ petitionbyfilingreturn.

Observations of the High Court

The High Court held that petitioners did not have any vested right for the appointment for which they were selected on the waiting list as the respondent Bank had no vacancy to be filled up. The writ petition was dismissed accordingly.

2. High Court of Judicature at Allahabad -Special Appeal No. 993 of 1995 - Reserve Bank of India, Kanpur vs. Vijay Kumar Dixit & Others - Decided on 7-7-99 by Hon'ble Mr. Justice Palok Basu and Hon'ble Mr. Justice, M.L. Singhal

Facts

An advertisement was issued by Kanpur Office in the news papers in the year 1980 inviting

applications from eligible candidates for the post of Clerk Gr. II/Coin Note Examiner Gr. II. Respondents applied for the post of Clerk Gr. II/ Coin Note Examiner Gr. II. As per the conditions of the advertisement only those candidates who qualified in a written test were to be called for the interview. On the basis of aggregate marks obtained in the interview and the written test the waiting list was to be prepared in the order of merit. Separate select list was required to be prepared for candidates belonging to general and special categories. The candidates were to be offered appointment in the order of their position in the waiting list as and when the vacancies arose during the currency of the waiting list. The respondents were called for attending the interview and were included in a waiting list of 443 candidates. All the candidates were intimated individually about inclusion of their names in the waiting list. The candidates were advised that the currency of the waiting list was usually one year from the date of preparation of the waiting list. The Bank appointed 213 candidates from the waiting list serially. The respondents were not appointed. The respondents filed writ petition No. 18171 of 1987 in Allahabad High Court seeking appointment in the Bank. Hon'ble Mr. Justice R.A. Zaidi vide judgement dated 9th November 1995 allowed the writ petition of the respondents with costs and directed the Bank to appoint the respondents in the Bank's service on the post of Clerk Gr. II/Coin Note Examiner Gr. II (Graduate) and not to appoint any other person until the said list was exhausted. Bank preferred special appeal No. 993 of 1995 in Allahabad High Court against the judgement dated 9th November 1995 of the Single Judge.

Observations of the High Court

The Division Bench of the High Court held that the Learned Single Judge had erred in coming to the conclusion that the list was to be taken as a select list. No direction for appointment could be issued even if it is held that the list published by the Bank was a select list. No person selected in an interview can claim appointment as a matter of right,onlyonthestrengthoftheselectlistsolong as the employer does not chose to appoint the persons against the vacancies then existing. The appeal of the Reserve bank was allowed. However, the court has desired that in future the Reserve Bank should announce the number of vacancies which it wants to fill so that there should not be any controversy about the list to be called as select or a waiting list. Vijay Kumar Dikshit and Motilal Yadav submitted before the court that in case they are considered for any vacancy by the Reserve Bank which may be existing today in pursuance of the result declared in the year 1982 relating to the vacancy of 1980, they would not claim any salary, arrears or seniority from 1980, 1981 or 1982 up to the date and shall confine all claims from the year 1999. The High Court also gave a direction to the Reserve Bank for considering the request of the respondents Vijay Kumar Dixit and Motilal Yadav sympathetically.

Comments

In view of the above direction of the High Court, it is advisable to the Bank to identify the number of posts vacant which are required to be filled up for which an advertisement is issued. Wait list of candidates may be limited to the extent of number of vacancies required to be filled as per the recruitment policy.

II. Absence due to arrest by police

Jammu & Kashmir High Court - SWP No. 766 of 1995 - Satish Bhardwaj vs. Reserve Bank of India others - Decided on 29th July 1999 by Hon'ble Mr. Justice R.C. Ganghi

Facts

Petitioner, an employee of the Bank was arrested by police in a criminal complaint on 11th August 1992 and was subsequently granted bail by the court. The petitioner applied to the Bank for treating him as on duty on the date of his arrest as he was in police custody and could not attend to his duties. The Bank did not treat him as on duty on 11th August 1992 when he was in police custody. The petitioner was treated as having absented from duty without pay and allowances under sub Regulation (2) of Regulation 39 read with Regulation 46 of the Reserve Bank of India (Staff) Regulations, 1948. Sub regulation (2) of Regulation 39 provides that an employee who absents himself from duty without leave or overstays his leave except under circumstances beyond his control for which he must tender a satisfactory explanation, shall not be entitled to draw any pay and allowances during such absence or overstayal and shall further be liable to such disciplinary measure as the competent authority may impose. The period of such absence or overstayal may be treated as period spent on extraordinary leave. Further in terms of sub Regulation (5) of Regulation 46 of the Reserve Bank of India (Staff) Regulations, where the absence of an employee from duty is without leave or his overstayal is due to being arrested for debt or for a criminal charge or for his having been detained in pursuance of any process of law, the provisions of Regulation 39 shall also apply and the employee shall be treated as having absented himself without leave or, as the case may be, overstayed otherwise than under circumstances beyond his control. In the light of these provisions petitioner's absence was regularised. Petitioner challenged the Bank's decision granting him extra ordinary leave without pay and allowances in the writ petition filed by him in the High Court. The Bank opposed the writ petition.

Observations of the High Court

The High Court held that the petitioner had absented himself without leave and had remained in police custody. The Petitioner was therefore, not entitled to be treated as on duty. The petitioner's acquittal from the criminal charge by criminal court has nothing to do with the absence from duty. Writ Petition filed by the petitioner was dismissed by the High Court.

III. Promotion

High Court of Judicature at Patna - CWJC case No. 2988 of 1998 - Kalyan Kumar vs. Reserve Bank of India, decided on 4-5-1999 by Hon'ble Mr. Justice A.K. Ganguly

Facts

Petitioner Shri Kalyan Kumar, an officer Grade 'B' of the Bank the writ petition prayed for quashing of the order of his non selection communicated by letter dated 26th March 1997 by the Chief General Manager, Patna. For considering an officer suitable for promotion to the post of Officer Grade. 'C' his annual performance appraisal reports for the preceding three years were considered by the Selection Committee. The selection Committee in the present case did not find

it possible to include the name of the petitioner in the panel of successful officers for promotion to the post of officer Grade 'C'. The case of the petitioner was considered by the Selection Committees in the year 1995, 1996, 1997 and 1998. The petitioner was not found suitable for inclusion of his name in the respective panel of candidates for four years. The petition was opposed by the Bank.

Observations of the High Court

It was held by the High Court that nobody has a right to be promoted. The only right is to be considered for promotion fairly and in accordance with law. The petitioner's case was considered for promotion and it was not the case of the petitioner that authorities were biased against him. The High Court was not inclined to interfere in the matter of assessment and consideration by the respondent Bank. The petition was dismissed.

Accuracy and diligence are much more necessary to a lawyer, than great comprehension of mind, or brilliancy of talent. His business is to refine, define, and split hairs, to look into authorities, and compare cases. A man can never gallop over the fields of law on Pegasus, nor fly across them on the wing of oratory. If he would stand on terra firma he must descend; if he would be a great lawyer, he must first consent to be only a great drudge.

- Webster, Daniel, Letter to Thomas Merrill, November 11, 1803, See Speak for Yourself, Daniel, edited by Walker Lewis (Boston: Houghton Mifflin Company, 1969), pp. 22-23.

Interference of Court in Encashment of Bank Guarantees -Some Recent Decisions

V.K. Jayakar
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The following judgements relating to bank guarantees reveal that the Courts of law have confirmed and relied upon the settled principle of law laid down earlier by several state High Courts and the Supreme Court of India to the effect that except in the case of fraud and irretrievable injustice proved beyond reasonable doubt, it will not be in order for the Court to interfere and no order of injunction restraining the encashment of bank guarantee can be passed. The judgements are discussed below in brief highlighting the issue raised, the essence of reasoning and the decision of Court.

I. M/s. Geo Tech Construction Company Private Ltd. vs. M/s. Hindustan Steel Works Construction Ltd., Cochin & Another - AIR 1999 Kerala 72

(a) Issue before the court

The question to be decided was whether the appellant was entitled to an order of temporary injunction restraining the respondent from enforcing the bank guarantee executed by the State Bank of Travancore, the second respondent, on behalf of the appellant in favour of the first respondent.

(b) Reasoning

The bank guarantee was executed specifically for the purpose of refunding the retention money in respect of the agreement for the execution of the work of site development, pile foundation and pile caps of the international stadium, Kaloor at Cochin by the appellant. The High Court of Kerala referred to the terms and conditions of the bank guarantee and specifically noted the following features among others.

(i) That the bank undertakes to unconditionally pay the amount claimed by Hindustan Steel Works Construction Ltd. (HSCL) without demur and thus to indemnify HSCL against any loss or damage, charges and expenses suffered by HSCL by reason of breach by appellant of any of the terms of contract.

(ii) That the decision of the HSCL as to the question of breach or as to the amount of loss or damage suffered by it shall be final and binding on the bank.

The Court observed that the dispute regarding payment of contribution towards dues under the Kerala Construction Workers Welfare Fund Act cannot be resolved in the present proceedings. The dispute between the parties on the interpretation of certain provisions contained in the underlying contract does not amount to fraud. As far as the bank is concerned when HSCL says that there is breach by appellant of the terms of contract that would be the final word. The obligations arising under the bank guarantee are independent of the obligation arising out of the specific contract between the parties. The Court further observed that in order to restrain the operation of the bank guarantee by an order of the Court, there should be a good prima facie act of fraud or irretrievable injustice. The person who pleads "irretrievable injury" must establish that the injury caused to him is genuine and immediate and also irreparable.

(c) Decision

The Court held that the appellant has not established a prima facie case nor is there any ground for the grant of temporary injunction against the invocation of the bank guarantee by the first respondent. The appeal was dismissed.

II. Hindustan Copper Ltd., vs. Rana Builders Ltd. - AIR 1999 Calcutta 230

(a) Issues before the court

The questions to be decided were whether interim relief against enforcement of bank guarantee could be granted and whether during pendency of arbitration proceedings relating to the disputed matter, the order of injunction granted by the lower court could be interfered with.

(b) Reasoning

The Bank of Baroda had furnished a bank guarantee undertaking to pay a specified amount to the appellant at the request of M/s. Rana Builders, contractor against any loss or damage caused to or suffered by appellant by reason of any breach by the said contractor of any of the terms and

conditions of the agreement. The High Court of Calcutta observed that the learned single judge was in error in assuming that this matter was not to be decided strictly on principles of injunction in relation to bank guarantee but general principles of injunction on lenders would be applicable and on that basis had proceeded to decide the matter. The contention of the respondent that the entire dispute was pending before arbitration and until the same was adjudicated upon, the injunction order under appeal which had provided adequate safeguard to both the parties could not be set aside, had to be rejected. The Court relied upon the judgement of the Supreme Court of India in Hindustan Steel Works Construction Ltd. vs. GS Atwal and Company (AIR 1966 SC 131) in which the Supreme Court did not accept the reasoning of the High Court that before invoking the performance guarantee the appellant should assess the quantum of loss and damages and mention the ascertained figure. The Court further observed that the letter of invocation in respect of the bank guarantee cannot be equated with documents that are required to be tendered under letters of credit. The bank guarantee can be invoked in a commercial manner and it is sufficient if the bank is satisfied that the guarantee is being invoked in accordance with its terms.

(c) Decision

The Court held that the respondent had failed to show prima facie case of fraud or irretrievable injury and the order of the learned single judge restraining the enforcement of bank guarantee was set aside. The appeal was allowed.

III. Lloyds Steel Industries Ltd. vs. Indian Oil Corporation Ltd. and Another - AIR 1999 Delhi 248

(a) Issue before the court

The question to be decided was whether an order restraining the first defendant from encashing the bank guarantee can be passed in favour of the plaintiff.

(b) Observations of the court

The High Court of Delhi observed referring to the relevant provisions of the bank guarantee that even assuming there had been a variation in the contract between the plaintiff and first defendant, the impugned bank guarantee given at the instance of the plaintiff by second defendant permitted suchtypeofvariationwithoutaffectingtheliability of second defendant in any manner. Thus any change, modification or novation of the contract was taken care of by the bank guarantee in question and it would remain unaffected despite the change or modification. The contract of guarantee by a bank in favour of the beneficiary is an independent contract between the bank and the said beneficiary and the said contract can always be enforced by the beneficiary by invoking the said bank guarantee at any time, during the subsistance of the contract of guarantee, whenever the beneficiary thinks it fit to do so. The Court referred to and relied upon the decision in Hindustan Steel Works Construction Ltd. vs. Tarapur & Company (AIR 1996 SC 2268). The Court further observed that the plaintiff had nowhere pleaded the particulars of any fraud nor had he shown prima facie case of any irretreivable injury. The variation was within the general condition of the contract. Since the contract of guarantee is

regarded as an independent contract the variation would have absolutely no effect on the liability of the banker to make payment to the beneficiary in accordance with the bank guarantee.

(c) Decision

The Court held that there is no force in the application for injunction to restrain the encashment of bank guarantee. The petition was dismissed and the encashment of bank guarantee was allowed.

IV. DLF Cement Ltd. vs. Inspector of Police, Hyderabad and Others - AIR 1999 AP 359

(a) Issue before the court

The question to be decided was whether the second and third respondents which are nationalised banks could be restrained by an order of injunction from honouring the bank guarantee.

(b) Reasonong

The Court of the learned City Civil Judge had allowed the application under section 8 of the Arbitration and Conciliation Act for reference of dispute between the petitioner and the first respondent to arbitration and passed a direction to the respondent banks to maintain status quo pending arbitration proceedings in respect of release of the bank guarantee. The petitioner had filed this revision petition before the High Court of Andhra Pradesh against the part of the said order directing the banks to maintain status quo. The Court observed that from the facts it is clear that there is no dispute regarding the entrustment of the contract to the fourth respondent and that there was delay in execution of the contractual work. In the event of any dispute between the petitioner and fourth respondent it was provided that the same should be referred to the arbitrator. It is not the duty of the Court to investigate the internal disputes between the parties who are entering into agreement. The banks which have issued guarantees are bound to honour the same when demand is made unless fraud is established. The Court referred to and relied upon the decisions in NTPC Ltd. vs. Hind Galvanising & Engineering Company Ltd. (AIR 1990 Calcutta 421); NTPC Ltd. vs. Flowmore Private Ltd. (AIR 1996 SC 445) and Svenska Handelsbanken Ltd. vs. M/s. Indian Charge Chrome (AIR 1994 SC 626). In the light of the said decisions, the Court observed that the rule is well established that a bank issuing guarantee is not concerned with the underlying contract between the parties to the contract and if the documents are in order, the bank giving the guarantee must honour the same and make payment. Hence the Court was of the view that when the dispute had been made out, while referring the dispute to arbitration the lower Court had erred in restraining the bank from making payment.

(c) Decision

The Court set aside the order of the lower Court directing the bank to stop payment till the pendency of the proceedings before the arbitrator. The revision petition was allowed.

V. M/s. Saw Pipes Ltd. vs. Gas Authority of India Ltd. & Another - AIR 1999 Delhi 308

(a) Issue before the court

The question to be decided was whether the application of the petitioner under Section 9 of the Arbitration and Conciliation Act seeking to restrain the first respondent from encashing the bank guarantee issued on behalf of the petitioner by ANZ Grindlays Bank Ltd. in favour of first respondent could be allowed.

(b) Observations of the court

The High Court of Delhi referred to a number of decisions of the Supreme Court of India and summarised the principles to be borne in mind by the Court in the matter of grant of injunction against enforcement of bank guarantee as under :-

(i) "a bank guarantee is an independent and distinct contract between the beneficiary and the bank and the rights and obligations therein are to be determined on its own terms;

(ii) a bank guarantee which is payable on demand implies that the bank is liable to pay as when a demand is made upon the bank by the beneficiary. The bank is not concerned with any inter se disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee.

(iii) Commitments of the banks must be honoured free from interference by the Courts. Otherwise trust in commerce, internal and international, would be irreparably damaged;

(iv) An irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of established fraud of an egregious nature as to vitiate the entire underlying contract; or in case of special equities in the form of preventing irretrievable injustice between the parties as noticed in the case of Itek Corporation.

v. The First National Bank of Boston etc. (566 Fed Supp 1210). Allegations of irretrievable injustice must be genuine and immediate as wellasirreversible."

The Court pointed out that the petition contains no facts or particulars in support of allegation of fraud. The main contract pursuant to which the bank guarantee was furnished was not sought to be avoided on the ground of fraud nor was it at any point of time alleged that the bank guarantee was issued because the first respondent was responsible for playing any fraud. On the facts no case of fraud has been made out. The question whether any amount was due to the first respondent was to be adjudicated in arbitration proceedings. In this context, the Court observed that the mere allegation that first respondent is attempting to encash the bank guarantee for an amount which has already been recovered by it, will not suffice to bring the case within the purview of the exception of irretrievable injustice. The Court referred to the specific provisions of the bank guarantee while opining that the guarantee was indisputably irrevocable and gave absolute discretion to the first respondent for invoking the same.

(c) Decision

The Court held that the bank cannot be restrained from honouring its commitment under the bank guarantee. The petition was dismissed.

VI. Comments

In the above cases, the Hon'ble High Courts have acknowledged and emphasised the binding nature of the Bank's undertaking and obligation to make payment to the beneficiary in accordance with the provisions of the document of bank guarantee. The Courts have declined to interfere and refused to grant injunction restraining the encashment of bank guarantee having found that no cogent ground has been established. The above decisions support the view that the banks have a duty to honour the bank guarantee when called upon to do so subject to certain limited exceptions.

(Devices of a lawyer in trouble).

First he wants to refer it to a committee. Secondly he thinks what terrible things may happen in the futrure.

- VANDERBILT, Arthur T., in Proceedings of Annual Conference of Municipal Magistrates and Traffic Court Prosecutors for 1949 (Trenton: Administrative Office of the Courts, 1949), p. 199G.

Recent Judgements Relevant to Bankers

Joseph Raj & Jonaki Saha
Legal Officers

I. W.M.P. No. 21536 of 1999 in Writ Petition No. 13216 of 1999 before the Madras High Court - Shri P. Natarajan vs. RBI & Others

Power of Reserve Bank of India to appoint Additional Directors to a banking company under Section 36AB of the Banking Regulation Act, 1949 - Production of files relating to the appointments for perusal of the petitioner.

Facts

Shri P. Natarajan (the petitioner) filed the above Writ Miscellaneous Petition seeking the issue of a direction to Reserve Bank of India to produce the relevant files relating to the appointment of S/ Shri S.V. Raghavan, R. Ramanujan and M. Subramanyan who are the Respondents Nos. 3 to 5 in the petition, as additional directors of Tamil Nadu Mercantile Bank Ltd. (Respondent No. 2).

In the main writ petition the petitioner had challenged the appointment of the nominee directors by Reserve Bank of India under Section 36AB of Banking Regulation Act, 1949. Section 36 AB(1) of the Banking Regulation Act Provides that if the Reserve Bank is of opinion that in the interest of banking policy or in the public interest or in the interests of the banking company or its depositors it is necessary so to do, it may, from time to time by order in writing, appoint, with effect from such date as may be specified in the order, one or more persons to hold office as

additional directors of the banking company.

Issue to be decided

The question to be decided by the Court in the Writ Miscellaneous Petition was whether disclosing of files relating to the impugned appointment would be harmful or injurious to the Reserve Bank of India or the public service.

Contentions of the petitioner

The petitioner has contended that no such circumstances prevail in the case as to exercise such power by Reserve Bank and it is with a view to helping the other Group and the impugned order does not disclose the circumstances under which the said appointments were made. Hence, the petitioner has come forward with the plea that the papers relating to the said appointments should be produced before the Court for better appreciation of the case and that the petitioner is entitled to peruse the papers. Further, it was submitted on behalf of the petitioner that Reserve Bank has not filed any affidavit claiming immunity under Section 123 of the Indian Evidence Act. Moreover, since the very same appointments were under challenge, disclosing the files would not be harmful or injurious to Reserve Bank of India or to the public service. The petitioner relied on the decisions in S.P. Gupta and others vs. President of Indian and Others (AIR 1982 SC 149) and R.K. Jain vs. Union of India (AIR 1993 SC 1769) in support of his contentions.

Contentions of Reserve Bank of India

It was submitted on behalf of the Bank that Reserve Bank is a banker to the bankers and so the documents relating to the inner working of the Bank are highly confidential, the disclosure of which to the petitioner might have undesirable results. Hence, the Bank's claim for privilege under the provisions of the Indian Evidence Act, 1872. However, Reserve Bank of India was ready to produce the same before the Court and not for the perusal of the petitioner. The Bank relied on the following decisions namely, S.P. Gupta and Others vs. RBI and M/s. Doypack Systems Pvt. Ltd. vs. Union of India (AIR 1988 SC 782), Reserve Bank of India vs. Central Government Industrial Tribunal (Vol. XV FJR 297).

Section 123 of the Indian Evidence Act gives right to Reserve Bank of India to claim privilege or immunity from disclosure of the said documents in public interest. The Supreme Court in S.P. Gupta and Others vs. President of India and Others has held that there may be classes of documents which public interest requires should not be disclosed, no matter what the documents in those classes may contain. In other words the law recognises that there may be classes of documents which in the public interest should be immune from disclosure.

Decision

The Court observed that except saying that Reserve Bank of India is a bank to the bankers, and that the paper relating to the impugned orders cannot be placed for the perusal of the petitioner as it will affect the public interest, no other material is placed before the Court to accept the said

contention. There must be some material to sustain the stand that if the petitioner's request is accepted the public interest will be affected and it will be harmful to the interest of the State or the public service. To consider whether the public interest is so strong to override the request of the petitioner, Reserve Bank should lay before this Court all relevant evidence. In this case, such evidence is lacking. The nature of the documents sought to be produced do not involve national security or high policy or high sensitivity. Hence, the petition was allowed as prayed for and the petitioner was allowed to peruse the documents sought to be produced by Reserve Bank of India.

II. Customer of bank running rice mill on lease, owner of which is indebted to bank- allegation of the bank that the customer closely related to owner and business is being run without discharging dues to bank - bank justified in issuing notice to the customer to close the account

Pawan Traders vs. State Bank of India & Another (1999) 98 Comp. Cas 98

Facts

The Opposite Party No. 2, a firm namely, Pyarelal Rani Bhagat had taken a loan of Rs. 3,00,000 from opposite Party No. 1, the State Bank of India, Kasinga Branch as working capital for running the Ganesh Rice Mill. The firm had pledged its stock of rice and paddy in the mill with the bank and executed an equitable mortgage in favour of the bank relating to the properties. Afterwards, the credit facility was withdrawn and the mill became defunct and opposite party No. 1 instituted a money suit for recovery of the bank's dues from opposite party No. 2 and its partners.

After closure of the Mill, the petitioner firm took the said rice mill on lease basis and has been running the rice mill and has opened its current account with opposite party No. 1. The proprietor of the firm Shri P.K. Bansal is closely related to some of the partners of the firm, Pyarelal Ram Bhagat and the father of Shri P.K. Bansal is the guarantor for the loan amount. On these grounds the banks issued a communication to the petitioner calling upon it to close its current account, falling which the bank proposed to close the account. Hence, the petitioner has filed the present writ petition before the Hon'ble Orissa High Court praying inter alia for declaring the notice/letter issued by the Opposite Party No. 1 as bad and illegal, and also for directing the Opposite Party No. 1 not to close the current account of the petitioner.

Issues

(1) Whether the bank is justified in issuing notice to the customer to close account?

(2) Whetheritisdifficultforthepetitionertoopen any current account in any other bank without a no objection certificate.

Findings of the Court

(1) The learned counsel for the petitioner has contended that the relationship between a banker and its customer is that of debtor and creditor. But in case the customer gives certain specific

direction to the bank and constitute the bank as his agent, the agency brings about a fiduciary relationship and the bank holds the amount of the customer not as a debtor of the customer, but in the capacity of a trustee.

Just as a customer has a right to close the account with a particular banker, the banker also has a right to say whether or not he would like to continue a particular person as its customer. However, a banker will not ordinarily be justified in closing an account and dishonouring cheques drawn against it without giving reasonable notice which is sufficient to enable the customer, having regard to outstanding cheques or bills, to make such arrangements as to obviate injury to his credit. The case of Champion Automobiles Ltd. vs. Travancore National Bank Ltd. (1938) 8 Comp Cas 23 has been referred wherein it was held that any rule giving the bank the right to close an account without reference to the depositor is invalid as it is opposed to the ordinary course of banking business. But so long as it is not a statutory obligation, the parties may contract in any manner they choose. In case, the customer fails to close his account the bank may close the account by returning the amount at his credit and asking him to return the unused cheque forms supplied to him.

Considering all these aspects, the Court has stated that the banker has the discretion to stop operation of the account or request the customer to close the account if he is found to be a persona non grata. But there must be reasons obvious to indicate the same and sufficient notice it to be given.

(2) As regards the second point, it has been stated by the Court that in case the account of the petitioner is asked to be closed, there is no bar for the petitioner to open any other account without the no-objection certificate issued by the concerned bank. There is no need for any certificate of good conduct to be given by the banker. There is no need for any certificate of good conduct to be given by the banker. In case, the petitioner desires to open a current account in any other bank after closure of the present account and the same is refused for any objection by the State Bank of India, the petitioner may take such exception as law permits and may take such steps as per law to protect its interest.

Decision

The Court held that in the instant case the bank has the grievance that in a circuitous process the petitioner is running its business without sqaring up the debts of the bank and the bank has given notice to the petitioner. Under such circumstances, if the bank has asked for closure of the account of the petitioner, there is nothing wrong as the steps are well justified. Therefore, the Hon'ble Court did not interfere in the matter and the application was dismissed accordingly.

III. Bank guarantee issued by the bank and counter indemnity bond issued by the beneficiary - beneficiary invoking guarantee during currency of guarantee - payment made after expiry of period of guarantee is a valid payment - customer bound to indemnify bank.

K. Basavaraj vs. State Bank of Hyderabad & Another - (1999)98 Comp. Cas 12.

Facts

At the request of the petitioner, the respondent No. 1 bank had issued a bank guarantee dated July 14, 1988 for a sum of Rs. 28,740 in favour of the Executive Engineer, P.W.D., Raichur for a period of one year commencing from July 14, 1988. The guarantee was extended from time to time at the instance of the petitioner upto July 13, 1991. A counter indemnity bond was executed by thepetitionerinfavourofthebankandaguarantor's agreement was also executed by the respondent

No. 2 as surety for the said bank guarantee facility. When the bank guarantee was in currency in favour of the Executive Engineer, he addressed a letter dated 21st May, 1991 to the plaintiff bank for renewal of the said bank guarantee upto July 31, 1993 and later on by a letter dated 11.7.91 the Executive Engineer put forth his claim to the guarantee amount of Rs. 28,740/-. The bank released the said guarantee amount of Rs. 28,740/ in favour of the beneficiary and instituted a suit against both the petitioner and respondent No. 2 for recovery of the amount. The petitioner denied his liability to pay the suit claim on the ground that the bank guarantee was not invoked by the beneficiary while it was in force, but it was invoked after the expirty thereof. The trial judge decreed the suit in favour of the petitioner. Respondent No. 1 bank being aggrieved by the said decree, has filed this revision application before the Karnataka High Court.

Issue

Whether the payment of the bank guarantee which was invoked during the currency of guarantee is invalid on the ground that the same was made after the expirty date of the guarantee.

Findings of the Court

The learned counsel for the petitioner submitted that the payment of the guarantee amount of Rs. 28,740/- was made by the Respondent No. 1 bank to the beneficiary on 2.11.91 i.e., after the expiry of the guarantee on 13.7.91 and the bank was not under any obligation to make any payment to the beneficiary after 13.7.91. Therefore, the petitioner and respondent No. 2 were not liable to indemnify the bank for the payments so made.

The Court held that the material thing for the beneficiary to enforce his claim under guarantee is that the demand must be put-forth by him on or before the date of its expiry. If the demand is made before the expiry of the guarantee, the bank is liable to pay the guarantee amount and the liabilitysubsistsinlawtillitisdischargedregardless of the fact whether or not the currency of the bank guarantee expired. Since the demand for payment was put forth by the Executive Engineer before the expiry date of the guarantee, the respondent No. 1 bank was bound to make the payment of the guarantee amount and the fact that the payment was made by the bank after the expiry date of the guarantee is wholly irrelevant and immeterial. Therefore, the payment so made by the bank being a valid payment, both the petitioner and respondent No. 2 are bound to indemnify the bank.

Decision

The Hon'ble Court dismissed the revision petition by holding that the trial judge was legally

justified in decreeing the bank's suit.

IV. Dishonour of cheque - return of cheque by bank with endorsement 'account closed' amounts to returning of cheque on the ground that the amount of money standing to the credit of that account is insufficient to honour the cheque - is offence under sec-138 of NI Act.

NEPC Micon Ltd. and Others vs. Magma Leasing Ltd. - AIR 1999 SC 1952

Facts

The appellant company had issued five cheques dated 1st January 1997 for various amounts, drawn on Canara Bank Broadway Branch, Madras, in favour of the Respondent Company. When those cheques were duly presented for encashment, they were returned by the Canara Bank, Madras with the remark "account closed". Thereafter, the Respondent Company filed a case before the Metropolitan Magistrate, Calcutta under Sec-138 of the N.I. Act. The appellant company approached the High Court for quashing the proceedings before the Metropolitan Magistrate, Calcutta. The appellants have also challenged before the High Court the order of the Metropolitan Magistrate rejecting their application under sec-258, Cr. P.C. for dropping the proceedings. The High Court rejected that Revision Application under Sec. 482, Cr. PC by its order dated 15th June 1998. Being aggrieved by the order, the appellant filed this appeal before the Supreme Court by Special Leave.

Issues

(1) Whether the returning of the cheque by the bank with an endorsement "account closed" comes within the purview of Sec-138 of the N.I. Act.?

(2) Whether Sec-138 of N.I. Act, which is a penal provision is to be interpreted strictly?

Findings of the Court

(1) The learned counsel for the appellant has submitted that return of the cheque on the ground that the account being closed would not be covered by sec-138 of the N.I. Act because that section envisages only two situations, i.e.,

(i) the amount of money standing to the credit of the account is insufficient to honour the cheque; or

(ii) it exceeds the amount arranged to be paid from that account by an agreement made with the bank.

The Court has opined that where a cheque is returned by the bank unpaid on the ground that the "account is closed", it would mean that the cheque is returned as unpaid on the ground that "the amount of money standing to the credit of that account is insufficient to honour the cheque". In this case the cheque is dishonoured as the amount of money standing to the credit of that account

was nil at the relevant time. The expression "the amount of money standing to the credit of that account is insufficient to honour the cheque" is a genus and the expression "that account being closed" is a specie. If after issuing a cheque drawn on an account, a person closes that account, it would certainly be an offence under Sec-138 as there was insufficient or no fund to honour the cheque in "that account" apart from the fact that it may amount to another offence. The Court has held that reading sections 138 and 140 together, it would be clear that dishonour of the cheque by a bank on the ground that account is closed would be covered by the phrase "the amount of money standing to the credit of that account is insufficient to honour the cheque".

2. It was contended that Sec-138 of the N.I. Act should be strictly interpreted and wider meaning should not be given to the words than what is used in the section. However, the court held that even with regard to a penal provision, any interpretation which withdraws life and blood of the provision and makes it ineffective and dead letter,shouldbeavoided.Ifstrictinterpretationis given to Sec. 138 of the N.I. Act, it would encourage dishonest persons to issue cheques and before presentation of the cheque close that account and thereby escape from the penal consequences of sec. 138.

The Court referred to the Heydon's rule of interpretation which says about the consideration of four matters, namely -

"(1) What was the common law before making of the Act.

(2) What was the mischief and defect for which the common law did not provide.

(3) What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth and

(4) The true reason of the remedy, and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy".

The Court referred to the decision of Three Judge Bench in the case of Modi Cements Ltd. vs. Kuchil Kumar Nandi (1998) 3 SCC 249 whereby the court agreed to the decision of the earlier case to the effect that if the cheque is dishonoured, because of "stop payment" instruction to the bank, Sec. 138 would get attracted. The Court observed that the object of bringing Sec. 138 on statute appears to be to inculcate faith in the efficacy of banking operations and credibility in transaction in business on negotiable instruments and to promote the efficacy of banking operations and to ensure credibility in transacting business through cheque. Sec-138 will become a dead letter if the contention is that by giving instruction to the bank to stop payment immediately after issuing a cheque against the debt or liability, the drawer can easily get rid of the penal consequences notwithstanding the fact that deemed offence was committed. Therefore, the Court opined that even though Sec. 138 is a penal statute, it is the duty of the Court to interpret it consistent with the legislative intent and purpose so as to suppress the mischief and advance the remedy.

Decision

The Court dismissed the appeal by holding that when the cheque is returned by a bank with an endorsement "account closed", it would amount to returning the cheque unpaid because "the amount of money standing to the credit of that account is insufficient to honour the cheque" as envisaged in Sec-138 of the Act.

V. Completion of the contract by the petitioner beyond prescribed period - guarantee issued by the bank thereby unconditionally and irrevocably undertaking to pay the amount to the respondent on demand invoked -injunction prayed for by the petitioner -failure on the part of the petitioner to plead that he was fraudulently led into entering of contract - the allegation that respondent is attempting to encash the bank guarantee for an amount, which has already been recovered by it, is not sufficient to bring the case within the ambit of exception in the case of irretrievable injustice - bank cannot be restrained from honouring its commitment under the guarantee - M/s. Coronation Construction Pvt. Ltd. vs. Indian Oil Corporation Ltd. and Others - AIR 1999 Delhi 268

Facts

Respondent No. 1 invited tenders for a contract for "enabling works for DHDS and MSPF Project at Mathura Refinery, Mathura, Uttar Pradesh, total estimated value of which was Rs. 1,67,39,828 and afterwards the petitioners were awarded the contract. The contract was to be completed on 11.3.97 but the same was completed on 17.1.98. The respondent No. 3 bank gave an unconditional performance guarantee No. 96/200 dated 12.12.96 for Rs. 18,20,455 thereby undertaking to make unconditional payment of all amounts demanded by the respondent No. 1 on demand without protest and demur or proof. The respondent No. 1 tried to invoke the bank guarantee and dispute arose between the petitioner and the respondent regarding the invocation of the guarantee. Therefore, the petitioners filed this petition before the Delhi High Court praying for an injunction against the enforcement of the bank guarantee on the ground that the invocation of the Bank Guarantee is vitiated by fraud and there would be irretrievable injustice to the petitioner if the same is allowed to be encashed.

Issues

(1) What are the principles to be borne in mind in case of granting of injunction against enforcement of Bank Guarantee/Irrevocable Letter of Credit?

(2) Whether the invocation of Bank Guarantee is vitiated by fraud?

(3) Whether there would be irretrievable injustice to the petitioner if the Bank Guarantee is allowed to be encashed?

Findings of the Court

(1) Referring the decisions of the Supreme Court in various cases, the Hon'ble Court has summarised the principles regarding the bank guarantee in the following lines.

"(i) a bank guarantee is an independent and distinct contract between the beneficiary and the

bank and the rights and obligations therein are to be determined on its own terms.

(ii) a bank guarantee which is payable on demand implies that the bank is liable to pay as and when a demand is made upon the bank by the beneficiary. The bank is not concerned with any interse disputes between the beneficiary and the person at whose instance the bank had issued the bank guarantee.

(iii) commitments of the banks must be honoured free from interference by the courts. Otherwise trust in commerce internal and international would be irreparably damaged.

(iv) an irrevocable commitment either in the form of confirmed bank guarantee or irrevocable letter of credit cannot be interfered with except in case of established fraud of an egregious nature as to vitiate the entire underlying contract; or in case of special equities in the form of preventing irretrievable injustice between the parties. Allegations of irretrievable injustice must be genuine and immediate as well as irreversible."

(2) As regards the allegation of commission of fraud in the execution of the contract, the Hon'ble Court mentioned that the petition contains no facts to the effect that the petitioner was fraudulently led into entering of contract with 1st respondent. The main contract pursuant to which the Bank Guarantee in question was issued was not sought to be void by alleging fraud. The Hon'ble Court also pointed out to the allegation that invocation of the Bank Guarantee by 1st respondent without assigning any reason was illegal and tantamounts to fraud. Therefore, it is held by the Court that a case of fraud committed in execution of the contract is not established by the aforesaid pleas and therefore, the petitioner isnotentitledtothegrantofinjunctionagainstthe invocation of bank guarantee on that ground.

(3) As regards the 3rd point, the petitioner contended that the Respondent No. 1 issued completion certificate on 28-2-98 and also recovered the entire mobilisation advance and is now trying to unjustly enrich itself by invoking the Bank Guarantee for an amount which has already been recovered by it. The petitioner also contended that there is a serious dispute on the question of performance of contract and the dispute is to be resolved by arbitration and so long the arbitrator does not make the award, no amount can be said to be due and payable by the petitioner to the 1st respondent.

However, the Hon'ble Court opined that the above facts are not sufficient for justifying interference by way of injunction. The fact that the 1st respondent is attempting to encash the Bank Guarantee for an amount, which has already been recovered by it,is not sufficient for bringing the case within the ambitoftheexceptiononthegroundofirretrievable injustice.

Decision

The Court held that as per the Bank Guarantee, the bank has unconditionally and irrevocably agreed to pay the amount to the 1st respondent on demand and, therefore, the 1st respondent can invoke the same at its discretion and the bank cannot be restrained from honouring its commitment under the Bank Guarantee in question. Therefore, the Hon'ble Court dismissed the petition on the ground that there is no merit inthepetition.

VI. Cheques signed by M.D. of company -dishonour of cheque on the grounds that sufficient funds were not available and exceed arrangement - notice under sec. 138 sent to M.D. is no informity - complaint not liable to be quashed on grounds that notice was not sent to company itself - M/s. Bilakchand Gyanchand Co. vs. A. Chinnaswami - AIR 1999 SC 2182

Facts

The respondent, A Chinnaswami, Managing Director of Shakti Spinners Ltd., signed six cheques which were issued in favour of the appellant. When the cheques were presented before the bank for payment, they were dishonoured on the ground that "sufficient funds were not available and exceed arrangement". Thereafter, the appellant sent a notice to the respondent, but the respondent refused to accept the same. On a complaint being filed under Section 138 read with section 142 of the N.I. Act, process was issued against the accused. The respondent moved an application before the Magistrate asking him to recall the process, but he failed in his attempt. Thereafter, the respondent filed a petition before the High Court under section 482 Cr. P.C. The High Court held that the sending of notice under section 138 to A. Chinnaswami at his Office address does not mean that the notice was sent to the company itself.Therefore, the High Court allowed the petition by quashing the complaint. Being aggrieved by order of the High Court, the present appeal was filed before the Supreme Court.

Issue

Whether there was any infirmity in the notice issued under Section 138 of the N.I. Act which was addressed to A. Chinnaswami, who was the signatory of the cheque?

Findings of the Court

The Hon'ble Supreme Court held that the decision of the High Court is erroneous. It is observed by the Court that the cheques which were dishonoured were signed by A. Chinnaswami, who was the Managing Director of Shakti Spinners Ltd. and the proceedings were initiated by the appellant against him. The process was issued by the Judicial Magistrate in his name. Therefore, there is no infirmity in the notice issued under Section 138 of the N.I. Act addressed to A. Chinnaswami.

Decision

The appeal was allowed by the Hon'ble Supreme Court by setting aside the order of the High Court and it was also held by the Court that the Judicial Magistrate will now proceed to decide the case in accordance with the law as expeditiously as possible.

There is nothing wrong with making money, but there probably is something very wrong, when a lawyer, charged with the duty to make the system of justice work in the public interest and for which the state gives lawyers a monopoly in their practice, begins to place a primary emphasis on money. It is the business entrepreneur, a financial risk taker, who is expected to do that. A

lawyer, a professional lawyer, should have other objectives. It is not without significance to note that both the English barrister and the French avocat are forbidden to engage in business activities.

- STANLEY, Justin A., "Comments on Professionalism, "Vol. 75 (Illinois Bar Journal (No. 2, October, 1986), p. 75.

Why might not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures, and his tricks? Why does he suffer this rude knave now to knock him about the sconce with a dirty shovel, and will not tell him of his action of battery? Hum! This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines, his double vouchers, his recoveries. Is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? Will his vouchers vouch him no more of his purchases, and double ones too, than the lenght and breadth of a pair of indentures? The very conveyances of his lands will hardly lie in this box; and must the inheritor himself have no more, ha?

Hamlet (vi 105) - And see Bander, Edward J., "Shakespeare and the Law," in Case and Comment (January-February, 1968) p. 52.