JUDGEMENTS SECTION

Recent Judgements Relevant to Bankers

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1. Suit for recovery of loss against bank - Bank proved to have acted negligently both at the time of opening of account and at the time of making payment of cheque in question - Plaintiff also established loss sustained by him - Plea of contributory negligence on the part of plaintiff cannot be permitted to be raised in Second Appeal

United Bank of India Vs. Central scentific Supplies Company Ltd. and Others AIR 1999 Madras 1.

Facts

The first respondent, a public Limited Co., having its head office at No. 29, Stringers St., Chennai was having a current account with the second respondent, Indian Bank, Tambaram Branch. The frist respondent issued a cheque crossed 'Account Payee only' on the 2nd respondent bank, dated 17-10-79 for a sum of Rs. 2,061.93 favouring M/s. Praful Shah & Bros. Bombay, which was sent by recorded delivery and it was the normal course of its business. The first respondent subsequently found that a sum of Rs. 20,061.93 was debited to its account by the second defendant and on enquiry it was found that the cheque had been presented to the appellant bank for a sum of Rs. 20,061.93 and the said amount had been paid by the 2nd respondent bank on 27.10.79. A police complaint was filed by the 1st respondent and the police, on investigation found that there were alterations in the cheque from the sum of Rs. 2,061.93 to 20,061.93 in both words and figures. It was also found that the account was opened in the name of M/s. Praful Shah & Bros. with the appellant bank on 25.10.79 giving the address as No. 162A, Ashok Nagar, Madras and the introducing party was a non-existent firm and the addres given was also false and out of the amount credited in his account, the amounts of Rs. 17,000, Rs. 1,739 and Rs. 1,100 were withdrawn by presenting 3 cheques. The 1st respondent filed a suit before the City Civil Court, Chennai, against the appellant and the 2nd respondent alleging that both the banks were negligent and they had not exercised normal diligence and care in the collection of the cheque amount and payment of the amount. The plaintiff/1st respondent stated that there was suspicious circumstances in the opening of the new account and the quick and hurried withdrawal of the cheque amount would clearly show that the banks were negligent and had not exercised normal care in opening of the new account, and therefore, they were bound to make good the loss sustained by the 1st respondent on account of the negligence and want of care on the part of the banks. The trial court placed reliance on the judgement in the case of Indian Bank Ltd. Vs. Catholic Syrian Bank AIR 1981 Mad, 129 and held that the appellant was liable to make good the loss of Rs. 20,061.93 sustained by the 1st respondent. on Appeal, before the XI Addl Judge, City Civil Court, Chennai, the first appellate court confirmed the findings of the trial court and dismissed the appeal. Thereafter, this second appeal was preferred by the appellant before the High Court of Madras.

Issues

1. Whether the courts below are right in holding that the provisions of section 131 of the Negotiable Instruments Act will not apply to the facts of the case?

2. Whether the judgements of the Courts below are vitiated for their failure to consider the effect of Ex-B-13 which is a clinching document against the 1st respondent?

3. Whether the 1st respondent was equally responsible as the cheque was sent through recorded delivery instead of sending the same through registered post.

Findings of the Court

1. It was a clear case of the 1st respondent that the benefit of the collection of the cheque of which the 1st respondent was the owner had not gone to it and the money covered in the cheque did not reach the drawee. The Hon'ble Court has stated that in these circumstances, the question of onus to prove the good faith and absence of diligence is on the appellant bank. The primary question for determination, in such type of cases would be, whether in the matter of realisation of cheque, the collecting bank had acted without negligence, negligence not only at the stage of encashment but also at the prior stages from the stage of receipt of cheque in question. The question whether the collecting bank had acted negligently at the time of opening of the account would be relevant under section 131 of the N.I. Act. The Court has referred the case of Bharat bank Ltd. Vs. Kishinchand Chellaram AIR, 1955 Mad 402 wherein it was held that if the opening of the account and the deposit of cheque are really part of the same transaction or if the cheque was put into the account so shortly after the opening of the account, it may lead to an inference that the collection was part of the opending of the account then the negligence on the part of the bank in the opening of the account must be treated as negligence in the matter of realisation of cheque as well. The Court has held that the evidence is clear that the account was opened without proper introduction because of the fact that the introducing party did not come to the bank put his signature in the introduction form and also that the introducing party was not having any current account in the appellant bank. The introducing party also told that he did not introduce the party to open the account in the appellant bank nor did he sign the introduction form. The variation between the signatures of the introducing party was also admitted. Therefore, the Court has upheld the findings of both the Courts that the appellant bank was negligent at the time of opening the account and the operation of the said account was so intrinsically connected with the opening of the account that they form part of the same transaction and the appellant bank was negligent both at the time of opening of the account and at the time of opeation of the account.

2. It was contended on behalf of the appellant that both the courts erred in omitting to consider Ex-B-13, the letter written by the 1st respondent to the appellant dated 22.11.79 thereby admitting that it had issued a cheque for a sum of Rs. 20,061.93 on the Indian Bank favouring M/s. Praful Shah & Bros. Bombay and therefore, it could not be pleaded that there was a loss incurred by the 1st respondent. After refering to the whole content of the letter, the Court has stated that the letter has to be read as a whole. The mention of Rs. 20,061.95 on that letter does not assume much importance when it is proved that the appellent bank was negligent in opening of the account. The Court has also stated that the finding that the cheque was altered is a pure finding based on evidence. And when the appellant bank was negligent, the amount withdrawn

do not assume much importance as the 1st respondent suffered loss by the acts of the appellant in negligently opening of the account and in permitting a party to operate the account to encash an altered cheque.

3. As regards the 3rd point the Court has held that as no such plea of contributory negligence was raised in the pleadings and there was no evidence on this aspect, such a submission cannot be entertained. The Court has further opined that when both the Courts have found that the appellant bank which is a public sector undertaking was negligent, it would not be proper for the public sector bank to plead contributory negligence.

Decision

The Hon'ble Court dismissed the petition by holding that the appellant bank acted negligently both at the time of opening of the account and at the time of payment of the cheque in question and therefore, the Courts below were right in decreeing the suit as against the appellant bank.

2. Constitutional Validity of Sec. 138 of N.I. Act - Sec. 138 punishes not the taking of loan, but failure of encashment of cheque - Non-provision for encashment of bill of exchange and promissory note by Act on different footing - Sec 138 not violative of Articles 14, 21.

Smt. Ramawati Sharma Vs. Union of India & Others AIR 1999 All 21.

Facts

Two complaints were filed by Shri Rahul Malaviya against Smt. Ramawati Sharma and Smt. Rama Shankar Sharma and Shri Suresh Chandra Sharma. in both these cases, cheques were isued by the accused persons for repayment of loans taken from the complainant. The cheques were deposited in the Indian Overseas Bank, Allahabad and the complainant was informed that the cheques could not be encashed because of the reasons that in the first case the drawer of the cheque had directed that no payment under the cheque should be made and in the second case, there was no sufficient deposit in the account against which the cheque was drawn. The complaints were filed after due notice and after failure of the accused persons to pay the sum under the cheque. The accused persons who are the petitioners of the present writ petitions were prosecuted for an offence under section 138 of the Negotiable Instruments Acts. The basic prayer in these writ petitions cover constitutional validity of section 138 of the Negotiable instruments Act.

Issues

1. Whether Section 138 of the Negotiable Instruments Act is violative of Articles 14,19,20,21 of the Constitution?

2. Whether the liability to repay the loan is simply a civil liability?

Findings of the Court

1. As far as the 1st point is concerned, after referring to the provisions of section 138 of the Negotiable Instruments Act and Articles 14, 19, 20, 21 of the Constitution, the Hon'ble Court has stated that we are concerned with Articles 14 and 21 only as the petitioner challenges the vires of a penal provision and the matter to be seen is as to whether the personal liberty of the petitioner is being taken away according to the procedure established by law which is not arbitrary. The protection of Article 21 could be invoked if at all the punitive provision appears to be violative of Article 14 of the Constitution. It has been alleged that the Negotiable instruments Act speaks of 3 types of instruments i.e. promissory notes, bill of exchange and cheques, but section 138 makes pubishable certain acts committed in respect of cheques only. After discussing the defination of these three instruments, the Hon'ble Court has held that the cheque and promissory note may not be equated, as a promissory note simply creates a liability, but by issuing a cheque, the drawer desires that certain payment is to be made in favour of the holder. Section 138 does not punish every dishonour of cheque, but only those cheques which are issued for discharge in whole or part, any debt or other liability. This provision has been introduced because of the fact that in business transactions, issuance of cheques to discharge a debt or other liability is a common transaction and to avoid immediate liability, people do take recourse to issuance of cheque which bounces on presentation at the bank. The provision of section 138 may not be deemed discriminatory because a promissory note basically differ from a cheque and only a cheque out of possible bills of exchange have been chosen to come under the perview of section 138.

2. It has been insisted on behalf of the petitioner that for incurring a loan, a person could not be made liable criminally. The Hon'ble Court has pointed out that the penal provision under section 138 is not for the loan itself but for certain further action on the part of the debtor i.e. the act of issuance of a cheque for discharge of a debt or liability. Section 138 penalises only a person who proposed to repay the loan by issuance of a cheque and the cheque is not encashed due to shortage of fund in the account. This further action on the part of the debtor cannot be quated with his action of taking of loan. Therefore, it may not be stated that liberty of a person is being curtailed by an arbitrary procedure and such a provision is violative of Article 21 of the Constitution.

Decision

The Hon'ble Court dismissed the writ petition by holding that there was no reason to declare the provisions of section 138 of the Negotiable Instruments Act as ultra vires the Constitution.

3. Bank Loan obtained for agricultural purpose - Suit for recovery of Debt-Debtor is not entitled for any scaling down in view of Section 21 A of Banking Regulation Act – Interest can be charged on the basis of yearly rests

Andhra Bank Vs Chittabathuni Shree Ramula and another AIR 1999 A P 52.

Facts

The respondents obtained two loans for a total sum of Rs.24,000/- from the plaintiff-appellant on the basis of a registered mortgage deed and a pro note in favour of the appellant. The

respondants undertook to repay the said amount to the appellant or order on demand, together with interest at 5% above the Reserve Bank of India rate, with a minimum of 14% per annum with quarterly rests. On the same day they also executed a separate letter stating that they would pay the entire amounts with interest before 31/5/76. But the respondents failed to discharge the debt by 31/5/76 and a debt acknowledgement letter was executed on 5/7/78. Meanwhile the respondends paid Rs.5,720/- and the balance was not paid. Therefore, the appellant filed a suit for recovery of Rs.21,184 being the principal amount and interest. In the said suit the respondents contended that they were agriculturists and the suit debt was incurred for agricultural purpose and therefore, they were entitled to the benefit of A.P. (Andhra Area) Agriculturists Relief Act, 1938 and as such the interest is liable to the scaled down. They further stated that the interest as claimed by the appellant was exorbitant, excessive and the claim of penal interest was orbitrary. The trial Court upheld the contention of the respondents by relying upon the rulings in Indian Bank, Alamuru Vs. Muddana Krishna Murthy, AIR 1983AP347, V Nukaraju Vs P. Edukondalu, 1982(2) APLJSH 16, M. Satyanayana Vs Andhra Bank Ltd. 1984(2) APLJSH21 and Kancherla purushottam Kandimcherla Negeswara Rao 1978(2) APLJ 145. The trial Court held that not withstanding Section 21A of the Banking Laws (Amendment) Act, 1983 the respondents were entitled for the benefit of A.P.Act IV of 1938. Being aggrieved by the decision of the trial court, the appellant has preferred this appeal before the Hon'ble High Court of Andhra Pradesh.

Issues

(1) Whether the interest is liable to be scaled down in accordance with the provisions of A.P.Act of 1938?

(2) Whether the interest claimed in usurious?

Findings of the Court

(1) While agreeing about the existence of a provision regarding scaling down of the debt under the A.P.(Andhra Area) Agriculturists Relief Act, 1938, the Hon'ble Court has pointed out the provisions of Section 4(e) of the Act, under which the Act is not applicable to any liability in respect of any sum due to any co-operative society including a land mortgage bank, registered or deemed to be registered under the Andhra Pradesh (Andhra Area) Co-operative Societies Act or any debt due to any corporation formed in pursuance of an Act of Parliament of United Kingdom or any special Indian law or Royal charter or Letters Patent. The view taken by the Court in Indian Bank Vs. Muddana Krishna Murthy AIR 1983 AP 347 to the effect that any special Indian Law would mean only the law made by the Indian Kingdom for India but not the law made by the Indian Legislature was overruled by the Hon'ble Supreme Court in the case of Bank of India Vs M/s Vijay Transport AIR 1988 SC 151 by holding that the phrase “Indian Law” found in Section 4(e) does not exclude a law made by the India Legislature and it also does not exclude a corporation either constituted in pursuance of such Indian Law or by such law itself. The Court further held that as the Banking Companies are constituted under Banking Companies Act, the A.P. Act IV of 1938 is not made applicable to the banking transactions and loans and as such the debtor would not be entitled for any relief under the Debt Relief Act. The other judgement in M. Satyanarayana Vs Andhra Bank Ltd. 1984(2) APLJ (34)2 relied by trial court

has also been overruled in the case of State Bank of Hyderabad Vs Advath Sakru AIR 1994 AP 170 by holding that prohibition contained under Section 21A of Banking Regulation Act not to reopen the transaction between the Banking Company and its' debtor applies equally to advances made for agricultural purposes. No distinction has been made under Section 21A between advances for agricultural purposes or for commercial purposes. Therefore, relying upon these judgements the Court has stated that the respondents are not entitled for any scaling down in terms of A. P. Act IV of 1938 in view of Section 21A of the Banking Regulation Act, even if the loan is for agricultural purpose.

(2) As regards the charging of interest by banks on quarterly or half yearly rests from the farmers, the Hon'ble Court has quoted the judgement of the Hon'ble Supreme Court in the case of Corporation Bank Vs D.S. Gowda 1994 AIR SCW2721 wherein in had been held that in case of agricultural loans the banks were not entitled to resort to either quarterly rests or half yearly rest in view of the circulars issued by the Reserve Bank of India in this behalf, since normally the farmers would be fluid only after they harvest the crops and thus get income once in a year. Therefore, the interests on such agricultural interests may be charged on yearly rests.

Decision

The Hon'ble Court partly allowed the appeal by holding to modify the impugned judgement and decree by awarding interest at the rate of 14% on the basis of annual rests from the date of the loan to the date of realisation.

4. Acquisition of status of Non-resident Indian - Appellant staying abroad for about 7 and half months to look after his mother - Cannot be said to have stayed for uncertain period - Not entitled to status of NRI

Major R.P. Verma (Retd) Vs Union of India & others AIR 1999 Delhi 53.

Facts

The appellant, a citizen of India had gone to London to look after his mother who was a permanent resident of U.K. She had acquired some assets including shares in British Companies. After her death, the appellant became the sole inheritor of the assets left behind by his mother. The appellant had stayed in U.K. for about seven and half months before returning to India and for some period, he was granted extension of time to hold assets abroad. However, he had not been granted permission by RBI to permanently continue to maintain and hold the assets left behind by his mother in England and was required to sell the said assets and repatriate the sale proceeds to India through banking Channel. The appellant beside seeking declaration to be treated as NRI for the limited purpose of holding the assets acquired by him by way of inheritance in U.K., had in the alternative sought the waiver of the condition of one year stay abroad to acquire the status of NRI. He had also challenged the Notification dated 17/7/92 issued by the Central Government under Section 14 of the Foreign Exchange Regulation Act, 1973(FERA) to the extent it imposes the condition of continous stay abroad for a period of one year to acquire the status of NRI. However, the learned single judge held that the case of the appellant was covered by Sections 2(p), 8 and 14 of FERA and he could not be treated as NRI.

Being aggreieved by the judgement, the appellant has preferred this appeal before the Delhi High Court.

Issues

(1) Whether the appellant is entitled to be declared as NRI ?

(2) Whether the Notificated dated 17/7/92 to the extent it prescribes condition of continuous period of stay of not less than one year outside India is illegal as it amounts to amending the Act ?

Findings of the Court

Under Section 2(p)(c) of FERA "person resident in India" does not include a citizen of India who has gone out of or stays outside for any purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period. The contention of the appellant is that since he had gone outside India with intention to stay for an uncertain period, he is not a person who can be said to be a "person resident in India". The Hon'ble Court has held that it can not be accepted that if a person goes abroad but at that time he does not know for how long he is going to stay abroad, that would indicate his intention to stay outside India for an uncertain period. A citizen may go abroad either on the business trip or as a tourist but is uncertain about the period of stay abroad or may go abroad to look after his ailing friend or relation with the intention to return India only after his recovery, but that by itself would not mean that such a person is a "person resident outside India". The period for which the visa may be issued by the country to be visited is also not relevant. The appellant had not gone abroad on immigration visa, but to look after his mother and came back after about seven and half months. In the Notification dated 17/7/92 issued under Section 14 of FERA the period of continuous stay for holding foreign exchange outside India has been provided as one year and under the provisions of Sections 8 and 14 FERA, no person is entitled to keep or hold foreign exchange unless permitted to do so. It is also not a case where the terms "Uncertain Period" has been defined and the impugned notification provides a different period. Further in exercise of the power under Section 14, which empowers the Central Government to acquire foreign exchange or order every person in, or resident in India by issue of Notification in official gazette, to sell foreign exchange to RBI, the impugned Notification has been issued, whereby the continuous period of not less than one year stay abroad has been prescribed as a condition to be entitled to keep or hold the foreign exchange. Therefore, the appellant cannot claim a right to keep or hold foreign exchange abroad since admittedly he does not fulfil the condition of one year continuous stay abroad.

2. As regards the second point it has been stated by the Hon'ble Court that there is no question of impugned Notification altering any provisions of Section 2(p)(i)(c) and there is no infirmity in the impugned Notification.

Decision

The Hon'ble Court dismissed the appeal holding that there was no merit in the appeal.

One can say categorically that there is no constitutional right of civil disobedience to a valid law.

- Cox, Archibald, in Howe, Mark De Wolfe and Wiggins, J.R. Civil Rights, the constitution and the courts.

Good counsellors lack no clients.

- Shakespeare, William