JAYAMOHAN

v.

HATTON NATIONAL BANK LTD

COURT OF APPEAL
WIGNESWARAN, J.
JAYAWICKREMA, J.
C.A. 691/88(F)
D.C. COLOMBO 86573/M
OCTOBER 28, 1998
NOVEMBER 12, 1998
MARCH 04, 22, 23, 26, 29, 1999
AUGUST 17, 1999
OCTOBER 04, 1998

Contract of Employment - Binding contract between Bank and Employee - Wilfully or negligently or fraudulently acting in breach of contractual duties - Duty of care on the part of Employee - Is the Employee liable in damages for breach of any term of his contract of employment? Claims in tort when parties are in contractual relationship

The Plaintiff Respondent Bank claimed that the Defendant Appellant in his capacity as a Cashier paid a certain sum handed over to him by the Bank to a party not legally entitled to such sum in any manner. The District Court entered Judgment in favour of the Plaintiff Respondent Bank.

Held :

(i) The pure economic loss suffered by a claimant being a natural and probable or indeed forseable type of harm arising from, the breach of his agreement by the Defendant - Appellant, there is no doubt that the recovery of pure economic loss, is admissible in law.

(ii) Duty of care on the part of the employee became an implied term of the contract of employment. Whether the Bank's cause of action lay on tort or breach of contract the fact that the Defendant Appellant, the employee owed a contractual duty of care to his master the Plaintiff Respondent Bank cannot be gainsaid?

(iii) A cashier is a trustee of the Banks money allotted to him at work. He cannot be heard to say that he owed no duty to check on the genuineness of a document placed before him for payment nor identifying properly the person who calls before him for payment with such a document - the Defendant Appellant is duty bound to check on both.

(iv) "Remembering the genuine signatures and mentally comparing them with the signature on documents presented before them are the special skills which every Bank clerk is expected to clothe himself with."

"A very broad principle of liability based on an assumption of responsibility had been established after the decision in Hedly Byrne's case and that this principle suggested a very considerable overlap between the tort of negligence and liability in contract between parties to contracts."

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to :

1. *Henderson v. Merett Syndicate Ltd.*, - 1995 2 AL 145
2. *Taitting Cotton Mill Ltd., v. Liu Chong Hing Bank Ltd.*, - 1986 AC 80
3. *Banque Keyser Ullmann S. A. v. Skandia (UK) Co. Insurance Ltd.*, - 1990 1 QB 665
4. *Hedley Byrne & Co. Ltd., v. Heller and Partners Ltd.*, - 1904 AC 465
5. *Burrows 1995 CLP 103, 118*
6. *Siththamparanathan v. Peoples Bank 1986* 1 SLR 414 - 415
7. *Bank of Ceylon v. Manivasagasivam* (1995) 2 SLR 79, 83

Faiz Musthapa P.C., with *S. Mahenthiran, R. Surendran, R. Balasubramaniam* for Defendant Appellant.

S. Sivarasa P.C., with *Shammil Perera, Arul Selvaratnam* and *S. C. Crosette Thambiah* for Plaintiff Respondent.

Cur. adv. vult.

November 29, 2000.

WIGNESWARAN, J.

The Plaintiff - Respondent Bank filed this action for the recovery of a sum of Rs. 32875/45 with interest and costs against the Defendant - Appellant, who was its employee. The Bank claimed that the Appellant in his capacity as a cashier of the Plaintiff Bank paid on 01. 09. 1981 the said sum out of the moneys handed over to him by the Bank, to a party not legally entitled to such sum in any manner. The Additional District Judge, Colombo, after trial, by judgment dated 21. 03. 1988 held in favour of the Respondent Bank. This appeal is against

the said judgment. The Respondent Bank has also filed papers under Sections 772 and 758 of the Civil Procedure Code objecting to the judgment and decree entered.

The learned President's Counsel on behalf of the Defendant - Appellant submitted that the Defendant - Appellant, a new entrant to service, was not responsible for the irregular payment and that the Plaintiff - Respondent Bank was solely responsible for it. The question of law urged was

(1) that if the Plaintiff was to fail in his action in Contract he cannot succeed in Tort. The rejection of the Plaintiff's evidence by Court, it was pointed out, was on the basis of contract.

Broadly the questions of fact and evidence urged by the learned President's Counsel for the Defendant - Appellant are as follows:-

(2) In the light of issues 10 and 11 being answered as "not proved" the Additional District Judge could not have answered issues 2(a), 2(b), 4 and 5 in the affirmative.

(3) In the light of issue No. 7 being answered as "not established" issue Nos. 2(a), 2(b), 3, 4, 5 and 8 could not have been held against the Defendant - Appellant.

(4) The Court could not have held that the Plaintiff was not obliged to inform certain practices and instructions of the Plaintiff Bank to the Defendant Officer.

(5) Issue Nos. 14 to 20 have not been answered.

(6) The Plaintiff did not call the person who prepared the voucher or the person in whose custody the "Pay Cash" seal was, nor produce all the vouchers paid out by the Defendant on 01. 09. 1981.

(7) The Court having found the Bank negligent and acting in an irresponsible manner could not have ordered the Defendant to pay the amount claimed.

The Plaintiff - Respondent Bank in their statement of objections to the judgment and decree appealed against by the Defendant - Appellant, inter alia, stated as follows:-

(1) Issue No. 7 had not been answered.

(2) Issue 6 and/or 16 should have been answered in favour of the Plaintiff - Respondent.

(3) Issue Nos. 10 and 11 should not have been answered as "not proved".

(4) The Judge erred in holding that the Plaintiff Bank and its officers were inefficient.

(5) The Judge erred in denying the Plaintiff - Respondent legal interest on the decreetal amount and costs.

It appears that this is a case where both parties have found the learned District Judge's evaluation of evidence and answering of issues wanting. Under the circumstances a review of the issues recorded, the evidence led and the answers given by the Judge becomes necessary.

The issues recorded on 11. 09. 1984 and the answers given by the learned District Judge as per judgment dated 21. 03. 1988 according to translations tendered are as follows:-

Plaintiff's issues

1. Did the Defendant as a Cashier of the Plaintiff Bank on 01. 09. 1981 pay a sum of Rs. 32, 875/45 out of the moneys given to him by the Plaintiff, to a person who had no right whatsoever to receive that money?

   Answer: Yes.

2. In terms of his contract of service with the Plaintiff, was the Defendant obliged

   (a) Not to make internal debit payments except upon internal voucher forms signed by duly authorised officers of the Plaintiff and except on the instructions and usages stated in paragraph 5 of the plaint and/or,

(b) Was the Defendant obliged not to make any payments to unknown persons or persons whose identity was not known, without making any inquiries, out of the large sums of money given to the Defendant by the Plaintiff?

Answer (a) and/or (b): Yes.

3. If the answer to issues No. 1 and 2(a) and/or 2(b) are answered in the affirmative has the Defendant made the said payment of Rs. 32,875/45 contrary to the duty cast by the said agreement.

Answer: Yes.

4. Was the Defendant obliged by duty -

(a) To act with responsibility and not pay money to an unknown or unfamiliar person and

(b) Not make internal payments except on internal vouchers signed by duly authorised officers of the Plaintiff and in terms of the aforesaid instructions and usages set out in paragraph 5 of the plaint and be responsible to the Plaintiff in respect of moneys entrusted to the Defendant?

Answer: Yes.

5. If issues No. 1 and 4 are answered in the affirmative has the Defendant paid the said sum of Rs. 32,875/45 in breach of the said duty?

Answer: Yes.

6. Did the Defendant appropriate the sum of Rs. 32,875/45 out of the moneys entrusted to him on 01. 09. 1981?

Answer: Yes.

7. Did the Defendant pay the said sum of Rs. 32,875/45 on 01. 09. 1981 upon an internal voucher

(a) said to have been signed by two officers of the Bank, but both of which were forged signatures, and

(b) which signatures were not in usual forms and ex facie containing several irregularities?

Answer: Not proved that the Defendant received the said money

8. If issue No. 7 is answered in the affirmative has the Defendant acted negligently and/or carelessly and/or fraudulently?

Answer: The Defendant has acted negligently and carelessly.

9. If issue No. 1 and any of the issues 3, 5, 6 or 8 are answered in the affirmative is the Plaintiff entitled to recover the said sum of Rs. 32,875/45 and legal interest from 01. 09. 1981 from the Defendant?

Answer: The Plaintiff can recover only a sum of Rs.32,875/45 from the Defendant

Defendant's issues

10. Did the Plaintiff give or cause to give the instructions set out in paragraphs 5(a), (b), (c) and (d) of the plaint to the Defendant and/or to other pay Clerks?

Answer: Not proved.

11. Did the Plaintiff inform or cause to be known the procedure set out in paragraphs 5(a), (b), (c) and (d) in making payments relating to internal debit vouchers?

Answer: Not proved.

12. Was the Plaintiff obliged to inform the matters stated in issue Nos. 1 and 2 to the Pay Officers?

Answer: No.

13. Did the Plaintiff at any time give the Defendant the specimen signatures of the Officers authorised to sign internal debit vouchers?

Answer: No

14. If the answers to issue numbers 1, 2 and 4 are "No" and the answer to issue No. 13 is "Yes" has the Plaintiff failed to take precautions in sufficient time to avoid making wrongful payments?

    Answer: Does not arise.

15. If the answer to issue No. 14 is "Yes" can the Plaintiff have and maintain this action?

    Answer: Does not arise.

16. (a) Did the Internal Debit Voucher marked P3 ex facie appear to be genuine and authorised?

    (b) Did the Defendant have reasons to suspect the signatures of those 2 persons who had signed them?

    Answer: (a) and (b) not necessary to answer owing to answers given to Plaintiff's issues.

17. If the answer to issue No. 16(a) is "Yes" and that for issue No. 16(b) is "No", then has the Defendant acted properly and bona fide?

    Answer: Does not arise

18. If the answer to issue No. 17 is "Yes" can the Plaintiff have and maintain this action?

    Answer: Does not arise.

19. Was it the established practice for the Cashier to make payment to the person who produces the Internal Debit Voucher if it appeared to be genuine and authorised?

    Answer: Not necessary to answer.

20. If the answer to issue No. 19 is "Yes", can the Plaintiff have and maintain this action?

    Answer: Does not arise."

This was a case in which the Plaintiff - Respondent Bank led the evidence of two witnesses and marked P1 to P21 while

the Defendant - Appellant depended solely on his own evidence. He had no documents to mark, no witnesses to call.

Briefly the facts are as follows:-

The Defendant-Appellant was employed as Clerk/Cashier/ Machinist by the Plaintiff-Respondent Bank on 10. 11. 1980. His conditions of service were set out in P1 and P2. Thereafter he was sent to a training school for training for one month. (Vide page 244 of the Brief). Prior to joining the Bank he had been an Audit Trainee at Messrs Sambamoorthy & Co.

The incident in question happened on 01. 09. 1981 about 9 months after joining the Bank. The Defendant - Appellant was still in his probationary period of service.

On 01. 09. 1981 the Defendant - Appellant served at a Paying Counter where cash was paid only for internal vouchers. Payment on internal vouchers had to be approved by the Accountant and another Senior Officer. Internal voucher dated 01. 09. 1981 marked P3 was produced before the Defendant - Appellant and he paid a sum of Rs. 32875/45 on the said voucher. Thereafter the Bank found that P3 was a fraudulent document. The two signatures in green and red thereon were not the signatures of the Manager nor Accountant nor any other Officer of the Bank. The account number thereon was not an account number of the Bank. The payee's name was mentioned as "T. Wimalaratne" who was not a person known to the Bank.

In the normal course of business the Defendant - Appellant was expected to find out on receipt of the internal payment voucher whether it had been duly approved, by examining whether it had been signed by authorised Officers. He should then have inquired whether the transaction mentioned had been done in relation to the Bank in which he worked. Thereafter he should have examined the reverse of the voucher to ascertain whether the payee's signature had been duly identified by someone authorised to do so. In this instance - the payee had

not been identified by anyone. Upto the date of payment on P3 the Defendant - Appellant had not paid such a large sum earlier. The Bank therefore expected that he should have taken special precautions before payment.

The Bank marked P8 and P9 dated 25. 08. 1981 signed by the Defendant - Appellant to the effect that he had seen P8 and P9, which two documents laid down routine procedural steps to be taken with regard to payments. Inter alia, P8 requested the staff members to exercise extreme care in handling cheques for large amounts. Apart from P8 and P9 it was stated that personal instructions had been given to the Defendant - Appellant regarding the precautionary steps that had to be taken with regard to payments. It was also contended by the Bank that the Defendant - Appellant would have known the signature of the Manager of his Branch (City Office) since the Manager signed P8 and P9 and the Defendant - Appellant had seen P8 and P9 only a few days earlier. If he had doubts he was expected to consult his Senior Officer seated close to him.

The Defendant - Appellant contended that he sincerely believed that the payment was due on the internal debit voucher and that he had no reason to think that the person to whom payment was made was not entitled to the said payment. He further pointed out that (i) no specimen signatures of Officers authorised to sign internal debit notes were provided; (ii) the Bank had not given necessary instructions to prevent payments of the nature made; (iii) adequate security measures had not been made in this regard; (iv) that some person or persons who knew that the Defendant - Appellant lacked experience in attending to internal debit notes may have fraudulently arranged for such payment to be made and (v) in any event the Bank was guilty of contributory negligence.

The Bank submitted in reply that circulars setting out the names of authorised Officers and their respective signatures were never given to the staff for security reasons. Even in other Banks such a step was not taken because it could give room to cashiers

to practice the specimen signatures and misuse them. It was pointed out that the signatures on P3 seen with the naked eye did not at all resemble the signatures of the Officers it purported to be. It was further pointed out that before an Officer makes payment he should satisfy himself that the payment was a lawful internal debit. He should also satisfy himself as to the identity of the person who presents the voucher. This procedure had continuously been carried out as a matter of routine though there was no written document stating such procedure. It was also said that as a matter of routine when payments exceeded Rs. 5000/- either the Accountant or one of the Assistant Accountants would normally go and inform the cashier at the appropriate counter (R6) to pay the sum (Vide page 132 of the Brief).

All these matters will now be examined in the light of the answers to issues given by the learned Additional District Judge.

The basic questions that should have been in the forefront of the learned Additional District Judge's judicial consideration in the background of the issues framed were

(a) Was there a binding contract between the Plaintiff and the Defendant? If so, was the Defendant aware of his contractual duties?

(b) Did the Defendant act either willfully or negligently or fraudulently in breach of his contractual duties?

A review of the evidence in this regard would presently be undertaken referring to the question of law raised by the Counsel for the Defendant-Appellant in the course of such review and thereafter to the issues of fact.

P1 was the contract of employment. The Defendant - Appellant admitted signing P1. (Vide page 295 of the Brief). At page 79 of the Brief certain clauses in page 2 of P1 appear as follows:-

"You should carry out all orders given to you by the Managing Director of the Bank or any other officer of the Bank or any person authorised by the Bank in that behalf and failure to carry out any such orders shall be regarded as insubordination or neglect of duty, as the case may be, on your part.

You should devote yourself exclusively to the duties of your office and truly, diligently, fully, faithfully, honestly and carefully in every respect serve the Bank and execute and perform and discharge the duties and obligations which shall from time to time devolve on you in regard to the business of the Bank and apply and devote your whole time, energy and attention to the business and affairs of the Bank."

Further down at the bottom of page 79 of the Brief, P1 states as follows:-

"The Bank reserves the right to discontinue your services at any time on the expiry of one month's notice to you or on paying you one month's salary in lieu of such notice.

It is a condition of your service that you will render yourself liable to immediate dismissal or discontinuance from the service of the Bank without previous notice -

(a) If in the opinion of the Management of the Bank, you have committed any breach of the conditions of your service or any act of misconduct, recklessness, neglect of duty, insubordination, insobriety, gambling, wagering, theft, criminal misappropriation, fraud, dishonesty or such other offences or any act which renders you unsuitable for retention in the service of the Bank;

(b) if by any act or omission on your part whether in relation to your employment upon your accepting this appointment or otherwise you suffer the loss of the confidence of the Management of the Bank in your capacity for work or your integrity.

(c) if you disclose to any person any of the dealings or affairs of the Bank or its customers."

The words "truly", "diligently", "fully", "faithfully", "honestly", and "carefully" were not empty words inserted into the document of contract of service, P1. They constituted express terms in the Defendant - Appellant's contract of employment. By these terms "duty of care" on the part of the employee became an implied term of the contract of employment. Whether the Plaintiff Bank's cause of action lay in tort or breach of contract, the fact that the Defendant - Appellant, the employee, owed a contractual duty of care to his master, the Plaintiff - Respondent Bank, cannot be gainsaid.

Chitty on Contracts [Twenty Eighth Edition(1999) - Vol. II (Specific Contracts)] at page 907, paragraph "39 - 192" states as follows:-

"The employee may be held liable in damages for the breach of any term of his contract of employment, whether express or implied, such as by his failure to use due care and skill. The employer is entitled to damages for those consequences which might reasonably be expected to have been in the contemplation of the parties (at the time when the contract of employment was made) as likely to result from the breach".

The present action was filed for the recovery of the actual economic loss - meaning the ascertainable immediate damages sustained by the Bank. The relevancy of the abovesaid reference from Chitty lies in the principle enunciated with regard to liability.

In discussing the development of the law with regard to the relationship between Contract and Tort in the filing of actions at pages 38 and 39 of the Twenty Eighth Edition (Vol. I) (1999), Chitty on Contracts has the following to state:-

"Where the constituent elements of a claimant's case are capable of being put either in terms of a claim in tort or for

breach of contract, the general rule is that the claimant may choose on which basis to proceed, though this rule is subject to a number of qualifications, notably where to do so would be inconsistent with the terms of the contract. This traditional position was clearly affirmed by the House of Lords in the important decision ***Henderson v. Merrett Syndicates Ltd***[1]. *which drew to close the uncertainty on this point caused by a dictum of Lord Scarman in the Privy Council in 1985 in* ***Tai Hing Cotton Mill Ltd, v. Liu Chong Hing Bank Ltd***[2]....." *"This dictum (of Lord Scarman) appeared to favour the exclusion of claims in tort where the parties were in a contractual relationship, though the context of its acceptance by later Courts was typically the denial of liability of recovery of pure economic loss in the tort of negligence (e. g.* ***Banque Keyser Ullmann S. A. v. Skandia (U.K) Co. Insurance Ltd***[3]. *However, paradoxically, the House of Lords' decision on the nature and ambit of the tortious liability to be found on the facts before it in* ***Henderson c. Marrett Syndicates Ltd.(Supra)*** *created new and very considerable uncertainty as regards the relationship of contractual and tortious claims between parties to a contract. For, it accepted that its own earlier decision in* ***Hedley Byrne & Co. Ltd. v. Heller and Partners Ltd***[4] *should be interpreted as establishing a "broad principle" of liability in tortious negligence based on the defendant's assumption of responsibility, an assumption which would appear to be satisfied whenever a party to a contract either possessing or holding himself out as possessing a special skill agrees to perform a service for the other party."*

It was said by Lord Goff of Chieveley in *Henderson's* case that a very broad principle of liability based on an "assumption of responsibility" had been established after the decision in *Hedley Byrne's* case and that this principle suggested a very considerable overlap between the tort of negligence and liability in contract between parties to contracts Page 46 - *Chitty on Contracts - Vol. 1 (28th Edition); vide also Burrows*[5]

Thus pure economic loss suffered by a claimant being a natural and probable or indeed foreseeable type of harm arising

from the breach of his agreement by the Defendant there is no doubt that the recovery of pure economic loss, as in this case, is admissible in law. The Plaintiff in this case has not asked for unspecified damages. It has claimed only the loss suffered by it due to the alleged irresponsibility on the part of the Defendant which amounted to a breach of the contract between the parties.

The fact that the Defendant - Appellant had committed a breach of his contractual and/or tortious duties was admitted by him during cross-examination at pages 330 and 331 of the Brief when he answered his questions as follows:-

"ප්‍ර - තමා දැන්වත් පිළිගන්නවද, පැ. 3 කොළ පාට අත්සනත් පැ. 11, පැ. 12, පැ. 13 සහ පැ. 14 වවුචර්වල බැසිල් විජේසේකර මහතාගේ අත්සන ද එකට සමාන තත්ත්වයෙන් නැති බව?

උ - පිළිගන්නව.

ප්‍ර - තමාගේ සිතේ සැකයක් නැතිව කියන්න පුළුවන්ද?

උ- ඔව්.

ප්‍ර - තව දුරටත් පැ. 3 මත ඇති අත්සන් සහ පැ. 8 සහ පැ. 9 ඇති විජේතිලක මහතාගේ අත්සන සමාන තත්ත්වයෙන් නැති බව පිළිගන්නවාද?

උ - ඔව්. මම ඊට එකඟ වෙනව.

ප්‍ර - තමා දන්නවාද පැ. 3 මත මුදල් ගෙවීමක් නොකල යුතු බව?

උ - ඔව්. මම දැන් දන්නව.

ප්‍ර - තමා පිළිගන්නවාද රතෙන් හා කොළ පාටින් තිබෙන අත්සන් බලයලත් නිලධාරීන්ගේ අත්සන් නොවන බව?

උ - ඔව්.

ප්‍ර - තමා දැන් පිළිගන්නවාද පැ. 3 රතු පාටින් සහ කොළ පාටින් ඇති අත්සන් බැංකුවේ 'ඒ' පත්තියේ කිසිම නිලධාරියෙකුගේ අත්සන් නොවන බව?

උ - ඔව්.

ප්‍ර - අද තමා කියනවාද පැ. 3 ඇති අත්සන් හොර අත්සන් කියා?

උ - ඔව්.

ප්‍ර - තමාට කියන්න පුළුවන්ද පැ. 3 අත්සන් හොර අත්සන් බවත්, ඒවා කාගේ අත්සන්ද ඒ ආකාරයට හොරට ගසා තිබෙන්නේ කියා?

උ - ඒ ගැන මට කියන්න බැරිය.,

It is in the light of such evidence that the learned Additional District Judge should have examined the issues. Instead an attitude of approbation and reprobation on the learned Judge's part has no doubt confused both sides.

There is no doubt that the internal debit voucher (P3) was forged. The Defendant - Appellant himself admitted it. (Vide page 367 of the Brief). That meant the signatures of Officers said to have signed within the "Pay Cash" stamp were not those of witnesses Wijetillake and Wijesekera who gave evidence nor any other Senior Officers in the Branch. In addition the signatures on P3 were ex-facie dissimilar to the signatures of those who purported to sign same. Further, the payee mentioned on the internal debit voucher, "T. Wimalaratne", was not a person to whom the Plaintiff - Respondent Bank owed any money.

There were three alternatives as to what took place at the time of payment. They were

(i) Either the Defendant - Appellant knew that P3 was a forgery and yet fraudulently paid on a forged internal debit voucher, or

(ii) did not take sufficient care to check the signatures, and precautions to ensure that the payment was due, specially because the amount was large, but recklessly and negligently paid on the voucher, or

(iii) checked the signatures and found them to be genuine and in order and therefore bona fide made the payment.

The learned Additional District Judge was called upon to decide whether the act of the Defendant fell under (iii) above or either of (i) and (ii). If he found that the Defendant's act did not

fall under (iii) he was per force expected to grant the relief claimed in the prayer to the plaint since the claim was for the return of the actual economic loss sustained by the Bank and not for any estimated unliquidated damages sustained by the Bank consequently.

The following matters had to be considered by the learned Judge in coming to his conclusion as to whether the Defendant - Appellant had acted reasonably and bona fide in terms of his contractual relationship with the Bank:-

(i) A cashier attached to a Bank, by virtue of his responsible post, was expected to be careful and circumspective. (In any event vide terms mentioned in P1 and P2).

(ii) He was expected to check on the genuineness of documents sent to him for payment. Whether the payment was internal or external the responsibility of ascertaining the genuineness of documents presented, lay with the Counter Clerk. That was his basic duty.

(iii) He was expected to ensure the identity of the person to whom payment was made. The Counter Clerk could not have said that he paid the person who brought the document without checking his identity. That would have been a dereliction of his contractual duties.

(i) <u>In this instance was the Defendant - Appellant careful and circumspective?</u>

The Defendant had with him P11, P12 and P13 at the time he made payment on P3. The signature of witness Wijesekera was on them (P11, P12 and P13). They were dealt with by the Defendant between 9 a.m. and 9.45 a.m. on that day itself before P3 was presented to him. (Vide pages 314 to 317 of the Brief). Defendant admitted at pages 328 and 329 as follows:-

ප්‍ර - දැන් තමාට කියන්න පුළුවන්ද පැ 11, පැ 12, පැ 13 බැසිල් විජේසේකර මහතා රතෙන් ගසන ලද අත්සන් පැ 3 තිබෙන කොළ පාට අත්සනට සමාන නොවන බව?

උ - ඔව්. මට වෙනස පෙනෙනව.

ප්‍ර - තමාගේ ඇසට පැ 3 ඇති කොළ පාට අත්සනෙහිත්, පැ 11, පැ 12. සහ පැ 13 ඇති බැසිල් විජේසේකර මහතාගේ අත්සනෙහිත් වෙනස පෙනෙනවා නේද?

උ - ඔව්.

අද, 86.06.16 වෙනි දින, මෙම සාක්ෂි කුඩුවේ සිට සාක්ෂි දෙන මේ අවස්ථාවේදී ඒ අත්සන්වල විශාල වෙනසක් තිබෙන බව මා පිළිගන්නව."

He further admitted being very familiar with the signature of Mr. Wikesekera at pages 332 and 333 of the Brief when he answered as follows:-

ප්‍ර - තමන් ආර් 6, කවුන්ටරයේ වැඩ කරන විට දිනපතාම වාගේ බැසිල් විජේසේකර මහතාගේ අත්සන් ඇති වවුචර් වලට මුදල් ගෙව්වා නේද?

උ - ඔව්.

ප්‍ර - ඒ හේතුව නිසා නේද. බැසිල් විජේසේකර මහතාගේ අත්සන තමාට හොඳින් පුරුදු වූයේ?

උ - ඔව්.

ප්‍ර - ඒක නිසා තමයි. වැනිකියුලන්බර්ග් මහතාට කීවේ බැසිල් විජේසේකර මහතාගේ අත්සන සම්බන්ධයෙන් තමන්ට හොඳ අවබෝධයක් තිබෙනවා කියා.

උ - ඔව්.

Though the Defendant - Appellant tried to make out that he came to know Mr. Wijetillake's signature only on 02. 09. 1981 he had no doubt seen P8 and P9 on 25. 08. 1981 wherein Mr. Wijetillake's signature had appeared. Mr. Wijetillake at page 89 of the Brief stated as follows:-

"පැ. 8 හි සහ පැ. 9 හි තිබෙන මාගේ අත්සන් දෙක හැරෙන්නට වුවද විත්තිකරු මාගේ අත්සන හඳුනාගෙන තිබෙන්නට ඇත."

Mr. Musthapha raised the question as to whether it was conceivable that a person who made payment would retain in his memory the genuine signatures. Remembering the genuine signatures and mentally comparing them with the signatures

on documents presented before them are the special skills which every Bank Clerk is expected to clothe himself with. After nine months' service the Defendant - Appellant could be presumed to have obtained such skill.

So it appears that the Defendant - Appellant was familiar or should be deemed to have been familiar with the signatures of Messrs. Wijetillake and Wijesekera when he paid on P3. In any event P11, P12 and P13 were with him when he made payment on P3. He admitted in evidence that the purported signature of Wijesekera on P3 was different. Furthermore P11, P12 and P13 did not have his signature in green ink as in P3. Mr. Wijesekera stated in evidence that he had never signed with a green ink pen. This should be seen in the light of Mr. Wijesekera signing as Accountant in most of the 100 or so vouchers dealt with by the Defendant - Appellant at Counter R6 in August 1981. Further in P11, P12 and P13 the name of the account to be debited was given as "Charges A/c General" whereas in P3 it was "General Charges A/c". There was no account in the said Bank called "General Charges A/c". (Vide last line of page 139 of the Brief)

All these matters (apart from the answers given by the Defendant - Appellant to the Inquiring Officer Mr. Vancuylenberg which are not referred to in this judgment) taken together with the fact that the Defendant - Appellant did not know "T. Wimalaratne" and made no attempt to identify the payee on P3 nor the person who presented P3 for payment to him, coupled with the fact that there was no signature of an authorised Officer on the reverse of P3 identifying the payee's signature and that the amount payable was much more than Rs. 5000/- would bring a Court to the conclusion that the Defendant - Appellant was not careful nor circumspective.

(ii) and (iii) Genuineness of P3 and the identity of the payee on P3

For the reasons mentioned hereto before, a Court would no doubt conclude that the Defendant - Appellant did not check on the genuineness of P3 as expected of him as an Officer of the

Bank nor ensure identity of the person to whom payment was made on P3.

But the Defendant - Appellant took up the position that the counter did not deal with encashment of cheques but paid on internal vouchers to persons to whom the Bank owed money. The internal vouchers, it was argued, were issued to the relevant persons by another Officer who should have been satisfied as to the identity of the payee and that there were dues from the Plaintiff - Respondent Bank to the payee concerned. It was also argued that the "Pay Cash" stamp was affixed by another responsible Officer before it was brought to Counter R6. It was the contention of the Defendant - Appellant that there had been no instructions whatsoever that identification should be obtained at Counter R6. Even the mode of identity required before payment was never informed. Contrary instructions were given, it was said, only on the day after this incident viz. 02. 09. 1981.

In other words the Defendant - Appellant has argued that it was his function only to dole out the money the moment an internal voucher was placed before him. The contention is that the Bank had employed him and trained him to pay money without ascertaining the identity of the payee nor the genuineness of the document. If so, such instructions by the Bank should have been produced. Otherwise it is reasonable to infer that the Bank expected identity of payees and ascertainment of genuineness of documents before payment on any voucher or cheque, internal or external. Not to infer so would make management of staff in any institution a nightmare. Every employee might scan the contract of employment and circulars distributed, to act prejudicially towards the employer under the cover of failure by employer to give specific instructions. Employee should not expect to be spoon fed at every step. If in doubt they certainly could consult their seniors or more experienced colleagues. Specially so with regard to Banks.

The Defendant - Appellant accepted receiving P8 and P9. He had in fact signed having read its contents [Vide P8(a) and P9(a)]. The Defendant - Appellant should have known after

25. 08. 1981 that the Bank was expecting extreme care in handling cheques for large amounts. Just because the payment at Counter R6 dealt with internal vouchers it did not mean that the extreme care expected of an Officer in paying large amounts in any way got affected. It would be preposterous to argue that Rs. 32875/45 was not a large amount in 1981. In any event the Defendant - Appellant had not paid such an amount earlier. Remembering the contents of P8 and P9 he should have checked carefully the genuineness of P3 and the identity of the person who tendered P3 to him. It is presumptious on the part of the Defendant - Appellant to say that the Plaintiff Bank had trained him and employed him at Counter R6 just to pay out the money the moment an internal voucher was placed before him. No Court could admit such a submission on the part of a Bank employee whether a "novice" or an "experienced senior". Utmost confidence and care is expected of any Officer employed in a Bank.

Justice Siva Selliah in **Sithamparanathan v. Peoples Bank**[6]

> *"It is needless to emphasize that the utmost confidence is expected of any officer employed in a Bank ..... he owes a duty both to the Bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the Bank. Integrity and confidence thus are indispensable and where an officer has forfeited such confidence as has been shown up as being involved in any fraudulent or questionable transaction, both public interest and the interest of the Bank demand that he should be removed from such confidence."*

The aforesaid dictum was referred to with acceptance by Chief Justice G. P. S. de Silva in **Bank of Ceylon v. Manivasagasivam**[7] **- at 83.**

A cashier is a trustee of the Bank's money allotted to him at work. He cannot be heard to say that he owed no duty to check

on the genuineness of a document placed before him for payment nor identify properly the person who calls over before him for payment with such a document. The Defendant - Appellant was duty bound to check on both - genuineness of P3 and identity of the payee who called before him.

Merely looking at P3 on the one hand and P11, P12 and P13 paid on the same day by the Defendant - Appellant on the other, the following discrepancies are visible -

(a) P11, P12, and P13 carry on the face of it the seal "AUTHORISED by ..... - as per Memo/Letter" and the word "Accountant" written on it. No such seal nor word appear on P3.

(b) P11, P12 and P13 refer to "Charges A/c General (Petty Charges and Sundries)" while P3 refers to "General Charges A/c". There was no account called "General Charges A/c" at this Bank.

(c) P11 referred to "Cost of 3 Towels for D.G.M's Toilet", P12 referred to "Toilet requirements for D.G.M's new toilet" and P13 to "Cost of 6 packets Air Freshner for Dealer's Department". P3 on the other hand referred to "Pay Mr. T. Wimalaratne on a/c of receipt No. 3/024/A". There is no evidence that the Defendant - Appellant checked as to what that endorsement meant. There was a senior officer seated close to him.

(d) The defendant - Appellant admitted that the signatures found within paying cashier's stamp on P11, P12 and P13 differed from the signatures on P3.

(e) Significantly P11, P12 and P13 carried a serial number "434", "433" and "431" respectively while P3 did not carry any such number even though the name of account sounded similar.

(f) P11, P12 and P13 each carried a signature (in fact the same type of signature) within the column "Officer - in - Charge/ Accountant/Manager" while P3 did not have any such signature.

These discrepancies are perceivable ex-facie even to a layman. The Bank stated as per P7 that the voucher (P3) "was not the usual form and contained irregular and/or suspicious features, and that payment was made without obtaining identification and contrary to instructions and practice." The Bank also pointed out to Defendant - Appellant that P3 was not duly authorised and that the signatures thereon were forged.

On the 2nd of September 1981 itself, the day after the payment was made, the Bank had pointed out by P4 that P3 did not bear signatures of any authorised Officer of the Bank. The only explanation given by the Defendant - Appellant by P5 was that on examination the Defendant - Appellant found the signatures of the Manager and the Accountant, which he accepted as correct and therefore paid cash. He stated on P5 that "To the naked eye the (se) signatures looked authentic".

It is the same Defendant - Appellant who wrote P5, answered at pages 330 and 331 as earlier referred to and at page 332 of the Brief as follows:-

"ප්‍ර - තමා පිළිගන්නවාද පැ. 3 හි ඇති අත්සන හොර අත්සනක් බවත්, ඒ හොර අත්සන බැසිල් විජේසේකර මහතාගේ අත්සන වෙනුවෙන් ගසා ඇති හොර අත්සනක් බව?

උ - ඔව්. මම හිතනව."

There is no doubt that if the Defendant - Appellant performed his duties diligently as a Bank Clerk as per the terms of P1 and P2 he would have noticed the discrepancies and therefore referred P3 to a Senior Officer before payment.

Quite rightly the learned Additional District Judge at page 433 of the Brief had stated as follows:-

කෙසේ වුවද, විත්තිකරු තමා සේවය කරන්නේ බැංකුවක බව ඔහු විසින් නොදන්නා කරුණක් ලෙස පිළිගත නොහැකිය. මුදල් පරිහරණය කිරීමේදී එම මුදල් ලබන පුද්ගලයා කවරෙක්ද යන්න පිළිබඳව කිසිම වැටහීමක් නොමැතිව කිසියම් පුද්ගලයෙක් විසින් තවත් පුද්ගලයෙකුට මුදල් දීමක් සාමාන්‍ය වශයෙන් සිදු නොවන අතර, බැංකු නිලධාරියෙකු විසින් කිසියම් පුද්ගලයෙකුට මුදල් දෙනු ලබන

විට එම මුදල් දෙනු ලබන්නේ කවරෙකුටද යන්න සනාථ කළ නොහැකි තත්ත්වයක සිට මුදල් දීම බැංකු නිලධාරියෙකුගෙන් අපේක්ෂා කරන සාමාන්‍ය කාර්යක්ෂමතාවයට වඩා අඩු බව පිළිගත යුතුය. මෙම නඩුවේ විත්තිකරු විසින් විමලරත්න නැමැත්තෙකුට රු. 32875.45 ක් පැ. 3 දරණ ලේඛනය අනුව දී ඇති නමුත් එම මුදල් කවරෙකුට දෙන ලද්දේද යන්න ඔහුට ස්ථිර වශයෙන්ම කිව නොහැකි වී ඇති බව පෙනේ. විත්තිකරු සඳහන් කරන්නේ විමලරත්න නැමැත්තා කාර්ය මණ්ඩලයේ සේවකයෙක් යැයි තමා අදහස් කළ බවයි. එසේ තමා අදහස් කළේ තම කවුන්ටරයෙහි අයි/ආර් සහ කොන්ත්‍රාත්කරු වන විමලරත්නට හැර වෙනත් බාහිර පුද්ගලයෙකුට මුදල් නොගෙවන නිසා බව ඔහු සඳහන් කර ඇත. කෙසේවුවද, විමලරත්න නැමැත්තා කාර්ය මණ්ඩලයේ සේවකයෙකු යැයි ඔහු අනුමාන කරන ලද්දේ නම් ඒ පිළිබඳව සැකයක් ඇති නොවන පරිදි ඉහළ නිලධාරියෙකුගෙන් ඒ පිළිබඳව විමසා බැලීම ඔහුගේ යුතුකමය. කිසියම් ගිවිසුමක සඳහන් වී නොතිබුණේ වුවද, තම ස්වාමියාගේ දේපල පිළිබඳව සුපරීක්ෂාකාරීව හා කාර්යක්ෂමව කටයුතු කිරීමේ වගකීමක් සෑම සේවකයෙකු වෙතම ඇත. ඒ බවට පැමිණිලි පක්ෂය සේවකයෙකු "ජනතා බෑන්ක් වර්සස් අහමඩ්" නඩු තීන්දුවෙන් සාධක ඉදිරිපත් කර ඇත. විමලරත්න නැමැත්තා පැමිණිලිකරුගේ සේවකයෙකු යැයි විත්තිකරු අදහස් කරන ලද්දේ වුවද, ඒ බවට විමලරත්න නැමැත්තාගේ අනන්‍යතාවය ඔප්පු කරන සාධකයකින් විත්තිකරු සෑහීමකට පත් විය යුතුව තිබුණි. එහෙත් විත්තිකරු විමලරත්න නැමැත්තාගේ අත්තසන් පැ. 3 ට ලබා ගැනීමෙන් පමණක් සෑහීමකට පත්වී ඇත. එසේ විමලරත්න නැමැත්තාගේ අත්සන ලබා ගැනීමෙන්ම විමලරත්න නැමැත්තා කවරෙක්දැයි හඳුනා ගැනීමට නොහැකිය."

Thus the learned Additional District Judge had quite rightly concluded that the Defendant had acted negligently and carelessly. (Vide answer to issue 8 - page 449 of the Brief). That would mean that the Defendant - Appellant did not properly check the signatures on P3 before payment. If he did properly check he would have found them to be not genuine and not in order. Checking of the signatures could have been done in comparison with the signatures on P11, P12 and P13. If there was any doubt the Defendant - Appellant could have referred the matter to the Senior Officer seated close to him. The amount after all relatively was unusually high. (Vide P10 and P10A. Page 90 of R6).

It is therefore not possible to come to the conclusion that the Defendant - Appellant made the payment bona fide. He was negligent and careless as stated by the learned Additional District Judge. The learned Judge also concluded that it had

not been proved that the Defendant - Appellant knew that P3 was a forgery and yet fraudulently paid on a forged internal debit voucher. We agree with his conclusion. So long as any nexus between the payee and the Defendant - Appellant had not been established nor any act or conduct on the part of the Defendant- Appellant that displayed positive knowledge on his part that P3 was a forgery, the benefit of the doubt must enure to the Defendant - Appellant.

In the light of our review of the evidence let us now critically examine the answers given to the issues by the learned Additional District Judge.

Answering in the affirmative issue No. 2 as "(a) and/or (b)" he had imported some confusion. The answer to our mind should have read as "2(a) - yes", "2(b) - yes" (though that appears to be the learned Judge's intention).

In answering issue No. 7 the learned Judge seems to have taken it to be connected to issue No. 6 and answered same as "Not proved that the Defendant received the said money". We believe this response was erroneous. It should have been answered in the affirmative. Issue No. 8 therefore should have been answered in view of the answers to issue Nos. 6 and 7 as "Yes. The Defendant had acted negligently and carelessly." We are unable to understand as to why the learned Judge in answering issue No. 9, restricted the Plaintiff's claim to Rs. 32875/45. This amount was due from the Defendant - Appellant on the day he paid that sum negligently and carelessly and the matter came to light (i. e. on 01. 09. 1981). If he did not reimburse that Bank on that day the Bank should have been granted legal interest. Therefore we conclude that the answer to issue No. 9 should have read as "Yes".

Coming over to the Defendant's issues, issue No. 10 deals with instructions in terms of paragraph 5 of the plaint being given or not to the Defendant and/ or other pay clerks.

In his letter to the Minister of Labour (P18) the Defendant - Appellant stated as follows:-

"When this voucher was presented for payment I checked it carefully and found it to be in order in all respects and sincerely and truly believed that the signatures that appeared thereon were the signatures of the Accountant and another Officer. They were so similar to the genuine signature of these officers and I had no doubt about their authenticity since the forgery was so cleverly done".

This implies that the Defendant - Appellant was instructed by the Plaintiff - Respondent Bank with regard to the contents of paragraph 5(a) of the plaint.

The contents of 5(b) and 5(c) were the normal functions of a Bank Clerk and it was unreasonable on the part of the Defendant - Appellant to distinguish between internal and external payments. To deny that checking of the identity of a person and genuineness of a document was necessary when the payment was internal, would connote as stated earlier in this judgment, that the Bank trained and maintained an Officer to simply dole out money without checking identity (of payee) nor genuineness (of document). In the light of the evidence of the two Officer-witnesses of the Bank, the Court could have presumed that instructions as per paragraphs 5(b) and 5(c) of the plaint were indeed given to the Defendant - Appellant. If there were any misgivings as to whether such identity and genuineness were to be checked or not, (since P8 in its penultimute paragraph had called upon staff members to refer to the Manager when in doubt with regard to identity) the Defendant - Appellant could have checked either with Mr. Wijesekera seated close to him or with the Manager Wijetillake, and found out whether it was his duty to check identity and genuineness when paying on internal vouchers.

As to the contents of paragraph 5(d) the evidence of Wijesekera confirmed that it was the practice for vouchers of Rs. 5000/- or more to be personally brought over by him or an Assistant Accountant to Counter R6 though the Defendant - Appellant denied such a practice. The learned Additional District Judge could have admitted the evidence of witness Wijesekera

in this regard. Witness Wijesekera's evidence was confirmed by witness Wijetillake. These are normal Bank practices even regular and long standing customers of any Bank are aware of. Usually when amounts are large a Senior Officer comes over to the counter, looks at the payee and nods at the Counter Clerk.

Therefore it was reasonable to conclude that instructions as per paragraph 5 of the plaint were in fact given to the Defendant - Appellant. Obviously the Defendant - Appellant (having been forced to admit subsequently in evidence that he had paid on a dubious document) could not have admitted the contents of paragraph 5.

The learned Judge had criticised the manner in which P8 and P9 were prepared and circularised. The haphazardness of the Bank's action in this regard could not have shielded the Defendant - Appellant from acting responsibly.

We would have therefore answered issue No. 10 in the affirmative rather than say "not proved". The standard of proof in this regard was on a balance of probability and as opposed to the denial by the Defendant - Appellant there was positive evidence of witness Wijesekera corroborated by that of witness Wijetillake which tilted the scale in favour of the Plaintiff Bank. Documents P8 and P9 contributed to such tilting.

This is so with regard to issue No. 11 too. The answer to issue 11 should have been "yes" instead of "not proved".

The learned Judge could have answered issues No. 16(a) and (b) instead of avoiding answering them. For the reasons given earlier in this judgment based also on the evidence of the Defendant - Appellant, the learned Judge, we believe, could have answered issue No. 16(a) as "no" and issue No. 16(b) as "yes". We would answer accordingly.

Thus the answers to issues, to our mind in the light of the evidence led and documents furnished should have been as follows:-

Issue	1	-	yes
	2 (a)	-	yes
	(b)	-	yes
	3	-	yes
	4	-	yes
	5	-	yes
	6	-	not proved
	7	-	yes
	8	-	yes
	9	-	yes
	10	-	yes
	11	-	yes
	12	-	no
	13	-	no
	14	-	does not arise
	15	-	does not arise
	16(a)	-	no
	(b)	-	yes
	17	-	does not arise
	18	-	does not arise
	19	-	not necessary to answer
	20	-	does not arise

With the answering of the issues as above, the submissions of the learned Counsel for the Defendant-Appellant with regard to the logic of answering issues 2, 4 and 5 in the affirmative in the light of the answers given to issues 10 and 11 by the learned Judge gets resolved. So to the answer to issue No. 7 which we have answered in the affirmative.

As to the answer to issue No. 12 we have allowed it to stand as "no". A Bank cannot be expected to dole out doses of cut and dried information at all times to its Officers with regard to obvious Banking practices. The Officers are presumed to know

them after training and employment. If they had doubt they should consult their superiors. There was no contractual duty cast on the Bank to inform the Defendant - Appellant that the latter should not pay money "to a person who had no right whatsoever to receive that money" (Issue 1) nor that the Defendant - Appellant under his contract of service was obliged "not to make any payments to unknown persons or persons whose identity was not known" "[Issue 2(b)]. The Bank Clerk in this instance should have known them after reading his terms of contract P1 and P2 and after receiving his training.

The learned Counsel for the Defendant - Appellant complained that Issue Nos. 14 to 20 were not answered.

With the answering of issue No. 16(a) and (b) by us this problem is resolved.

As to the penultimate submission of the learned Counsel for the Defendant - Appellant the person who prepared the voucher (P3) could not have been called, as insisted upon by him, because it had been found to be a forgery. The necessity to produce all the other vouchers paid by the Defendant - Appellant on 01. 09. 1981 would have arisen only if the Defendant - Appellant insisted that the signatures on P3 were exactly similar to the Officers' actual signatures. The Defendant - Appellant having been forced to accept in cross examination that P3 per se appeared to be a forgery, evidence in rebuttal to produce other vouchers did not arise. In any event the Officers who should have signed P3 and whose signatures were purported to be on P3 had given evidence that P3 was a forgery. Therefore the learned Counsel's submission in this regard is rejected.

With reference to the final submission the learned Additional District Judge had no doubt found that the Bank's management system at that time had much to be desired. But that was no excuse for the Defendant - Appellant to have acted negligently and carelessly. The learned Judge had rightly concluded that the Defendant- Appellant was obliged to pay back the money carelessly and negligently paid by him on P3.

As for the submissions made by the learned Counsel for the Plaintiff - Respondent we have now answered issues 7, 10, 11 and 16. The learned Judge did point out certain shortcomings with regard to the management techniques adopted by the Bank such as sending a thin sheet of paper (P8) to be signed and sent by Officers, instead of having copies of P8 distributed to all Officers etc. This did not mean that the Managing Officers were inefficient. We must not forget that until cases of this nature crop up, a Bank does not necessarily gear itself to face up to such eventualities. But the fact that the Bank's Officers did consider such eventualities is brought out by the circularising (by obtaining signatures of Officers after they perused them) of P8 and P9.

With regard to the denial of interest to the Plaintiff - Respondent Bank we have now put the record correct.

We therefore amend the answers to the issues given by the learned Judge to read as given by us hereabove and amend his conclusion to give judgment as prayed for in the plaint dated 17. 05. 1982. We dismiss the appeal of the Defendant - Appellant and order that he shall pay the taxed costs of this appeal too to the Plaintiff Respondent.

JAYAWICKRAMA, J. - I agree.

Appeal dismissed.