1963

February, 7.

BANK OF BIHAR LTD.

v.

MAHABIR LAL & ORS.

(K. SUBBA RAO, RAGHUBAR DAYAL and J. R. MUDHOLKAR, JJ.)

Negotiable Instrument—Firm presents cheque to Bank—Amount kept in the hands of Potdar of Bank—If payment to firm—Statement in judgment about happening in court—Challenge if and when permitted—Vicarious liability for criminal act of servant—Negotiable Instruments Act, 1881 (XXVI of 1881), ss. 85, 118.

Respondents 1 and 2 carried on business under the name and style of M/s. Jogilal Probhu Chand. Under a cash credit agreement in favour of the Bihar Sharif Branch of the Bank and on the strength of a promissory note executed by the firms, the firm drew a cheque on the Bank which was passed for payment. The High Court found that the money was not paid to the firm but was kept in the hands of the Potdar a servant or agent of the Bank for being paid to another firm at Patna. This person accompanied the respondents up to Patna but failed to meet the respondents at the shop of the Patna firm which was the place agreed upon. Before the High Court the counsel for the present appellant conceded that the Potdar had taken the money with him.

Before this Court it was contended on behalf of the appellant that no concession was made as stated in the judgment of the High Court, to the effect that the Potdar took the money with him. It was further contended that the payment to the Potdar should be deemed to be payment to the firm. Reliance was also placed on ss. 85 and 118 of the Negotiable Instruments Act, 1881. Finally it was contended that the Bank could not be held responsible for the money misappropriated by the Potdar because his act was a criminal act.

Held, that where a statement appears in the judgment of a court that a particular thing happened or did not happen befor it, it ought not ordinarily to be permitted to be challenged by a party unless both parties to the litigation agree that the statement is erroneous.

The money not having passed into the actual custody of the firm or that of the custody of a person who was servant or agent of the firm, the firm cannot be held liable for it.

In order to avail of the provisions of s. 85 of the Negotiable Instruments Act it has to be established that payment had in fact been made to the firm or to a person on behalf of the firm. Section 118 of the Act was held not to have any bearing upon the case at all.

Jugjivandas Jamnadas v. *The Nagar Central Bank, Ltd.* (1925) I. L. R. 50 Bom. 118, distinguished.

Vicarious liability may in appropriate cases, rest on the master with respect to his servant's acts but it cannot possibly rest on a stranger with respect to the criminal acts of a servant of another.

Gopal Chandra Bhattacharjee v. *The Secretary of State for India* (1909) I. L. R. 36 Cal. 647 and *Cheshire* v. *Bailey*, [1905] 1 K. B. 237, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 340 of 1960.

Appeal from the judgment and decree dated March 11, 1958, of the Patna High Court in F. Appeal No. 230 of 1950.

Sarjoo Prasad and *R. C. Prasad*, for the appellant.

N. C. Chatterjee, M. K. Ramamurthy, R. K. Garg, S. C. Agarwala and *D. P. Singh*, for the respondent No. 1.

1963. February 7. The Judgment of the Court was delivered by

MUDHOLKAR, J.—This is an appeal by a certificate granted by the Patna High Court allowing the appeal preferred before it by the defendants 1 and 2 and dismissing the claim of the plaintiff Bank (the appellant before us) for a sum of Rs. 35,000/-. *Mudholkar, J.*

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According to the Bank, defendants 1 and 2 carried on business at Bihar Sharif under the name and style of Messrs. Jogilal Prabhu Chand. On February 17, 1941, they executed a cash credit agreement in favour of the Bank under which cash credit facilities were sanctioned up to a limit of Rs. 50,000/- against cloth bales on certain terms. Under that agreement a sum of Rs. 15,000/- was advanced to the Firm on that very day. On August 28, 1947 the Firm executed a promissory note in favour of the Bihar Sharif branch of the Bank for Rs. 50,000/- and approached the Manager for immediate advance of Rs. 35,000/- as they required that amount for paying the price of certain cloth allotted to them by M/s. Manohardas Jainarain, wholesale dealers of Patna. Then according to the Bank, an arrangement was entered into between the Firm and the Manager of the Bihar Sharif branch of the Bank under which the Firm was allowed to draw on the security of the promissory note on its agreeing to pledge the bales of cloth as further security after they were received from the wholesalers. On the basis of this agreement, the Firm drew a cheque for Rs. 35,000/- on August 29, 1947 in favour of the second defendant, which was, according to the Bank, actually passed for payment by the Manager of the Bihar Sharif Branch of the Bank and the amount was paid to the second defendant. Further, according to the Bank, on August 30, 1947 a "false and mischievous" telegram purporting to be from defendant No. 2, Mahabir Lal, was received by the Manager of the Bihar Sharif branch of the Bank saying that the Potdar of the Bank who was sent along with him with the money by the Manager had not deposited it and that the Potdar could not be traced. The telegram contained a further request that the amount of Rs. 35,000/- be made available to the firm immediately. On September 1, 1947 the Manager informed the Firm that the allegations in the telegram were altogether false. On September 9, 1947 the Manager

received a letter signed by Mahabir Lal alleging that in collusion with the Potdar he, (the Manager) had misappropriated the sum of Rs. 35,000/-. These allegations are said by the Bank to be false and the suit out of which this appeal arises was instituted for the recovery of the amount for which the cheque was drawn by the Firm on August 29, 1947 and actually cashed by the Manager.

The defendants denied the claim of the Bank as false. According to them, the suit was a counter-blast to a criminal case instituted by them against the Manager and the Potdar of the Bihar Sharif branch of the Bank charging them with misappropriation. While the defendants admitted that they had made arrangements with the Bihar Sharif branch of the Bank for a loan of Rs. 35,000/- as alleged by the Bank for taking delivery of 42 bales of cloth which had been allotted to them by M/s. Manohardass Jainarain, wholesale dealers of Patna, they contended that the second defendant was informed that under the rules the Bank could advance a loan only upon the goods actually kept in the custody of the Bank. They further alleged that the Manager said that in order to oblige the Firm he was prepared to advance Rs. 35,000/- provided certain conditions were fulfilled. Those conditions were : (1) that the Firm should execute a loan bond as well as a promissory note for Rs. 50,000/- as further security ; (2) that the firm should draw a cheque for Rs. 35,000/- endorsed to self ; (3) that the second defendant should furth-r agree that instead of taking the amount in cash with himself he should let the amount be sent by the Manager, Mr. Kapur, through Ram Bharosa Singh, Potdar of the Bank for being paid to M/s. Manohardass Jainarain, and (4) that after paying the amount the said Potdar would take delivery of the bales of cloth allotted to the Firm and bring them to the premises of the Bank at Bihar Sharif where they would remain pledged until the loan was repaid

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The Firm thus denied that the sum of Rs.35,000/- was actually paid or advanced to them by the Manager of the Bihar Sharif branch of the Bank. According to the Firm, a cheque was drawn at 5.00 a. m. on the next morning and after it was handed over to Mr. Kapur, he went inside the treasury of the Bank alone with the potdar and returned with something wrapped in a *gamchha* and tied it round the waist of the Potdar and said that the latter would hand over the money to M/s. Manohardass Jainarain, take delivery of the goods and bring them to the premises of the Bank where they would be kept in pledge. Thereafter the Potdar and the second defendant, along with one Mahadeo Ram, a servant of the Firm left for Patna by bus. On reaching the *ekka* stand of Patna, the Potdar asked the second defendant to proceed to the premises of M/s. Manohardass Jainarain saying that as he had to go to the Patna City Branch of the Bihar Bank, he would follow later. He assured the second defendant that he would bring along with him the sum of Rs. 35,000/-. The second defendant then went to the premises of M/s. Manohardass Jainarain and waited for the Potdar to turn up. As he did not come within a reasonable time, he went to the Patna City Branch of the Bank only to discover that the Potdar was not there either. It was after this that the telegram mentioned in the plaint was sent to Mr. Kapur and a report lodged with the Police at Patna. The second defendant says that on his return to Bihar Sharif on August 30, he saw Mr. Kapur and told the whole story to him whereupon Mr. Kapur said that he should not worry and that he would see to it that the bales were released soon by M/s. Manohardass Jainarain. Nothing, however, happened and, therefore, the defendants filed a criminal complaint against Mr. Kapur as well as the Potdar. Eventually, however, the complaint filed by the defendants failed.

In its judgment the trial court has said :

> "Moreover even if it be accepted for the sake of argument that Ram Bharosa Singh went with the money along with Mahabir Lal as alleged according to the term of the contract he would be deemed to be a temporary servant of Mahabir Lal for that purpose which fact is evident from the defendants' evidence also as according to their evidence Mahabir Lal met the cost of his Nashta (breakfast) and fare of the bus."

Apparently because of this, when the Firm's appeal was being argued before the High Court, the Bank's counsel Mr. B. C. De conceded that Ram Bharosa Singh, Potdar, did take the money to Patna where he went along with the second defendant, which implies that the defendant No. 2 was not actually paid the amount for which the cheque was drawn by the Firm. In this connection we would quote the following statement appearing in the judgment of the High Court :

> "Mr. B. C. De, who appeared for the plaintiff conceded at the outset that, in fact, Rambharosa Singh, Potdar, had taken the money to Patna City to pay to the Firm of Manohardass Jainarain as is the case of the contesting defendants. He however, urged that, even then, the defendants would be liable for the claim of the plaintiff. He urged that Rs. 35,000/- had gone out of the coffers of the Bank against the cheque for Rs. 35,000 issued by the defendants. The Bank was, therefore, not responsible as to who, in fact, got the money after it was duly presented and honoured by the Bank."

The High Court then pointed out that Mr. De placed reliance upon certain decisions of the Calcutta and Bombay High Courts and s. 85 of the Negotiable

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Instruments Act. Before us, however, it is urged on behalf of the Bank that no such concession was made by Mr. De. The second defendent has filed an affidavit which counters the Statement made on behalf of the Bank. In our opinion where a statement appears in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily to be permitted to be challenged by a party unless of course both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. If the High Court had proceeded on an erroneous impression that Mr. De had conceded that the money was taken along with him by Ram Bharosa Singh to Patna, there was nothing easier for the Bank than to prefer an application for review before the High Court after the judgment was pronounced or if the judgment was read out in court immediately draw the attention of the court to the error in the statement. Nothing of the kind was done by the Bank. It is too late for the Bank now to say that the statement was wrong. It appears to have been argued on behalf of the Bank in the trial court alternatively that even on the assumption that the money was taken to Patna by Ram Bharosa Singh, the suit must be decreed. We, therefore, see nothing strange in Mr. De making a concession of the kind attributed to him by the High Court. In the circumstances we decline to go behind what is contained in the judgment of the High Court, quoted earlier.

The next question is whether the sum of Rs. 35,000/- could be said to have been paid by the Bank to the Firm. Upon the admitted position that the amount of Rs. 35.000/- was not actually received by the Firm in the sense that it was not handed over to the second defendant who had presented the cheque, could it be said that it must be deemed to have been paid to the firm since it was handed over

to the Potdar for taking it to Patna ? It is no doubt true that the Potdar did accompany the second defendant to Patna but it is difficult to hold that he being a servant or an agent of the Bank could also be said to have been constituted by the Firm as its agent for carrying the money to Patna. It is not the Bank's case that it was at the suggestion of the defendant No. 2 that the money was handed over to the Potdar. Perhaps it was not the normal duty of a Potdar to carry money on behalf of the Bank for payment to a party at its place of business. But even if it is not, we cannot overlook the fact that the arrangement which was arrived at between the Firm and Mr. Kapur was also an unusual one. Mr. Kapur admittedly had no authority to pay Rs. 35,000/- to the Firm before the goods or documents of title relating to the goods were placed in the custody of the Bank. Since Mr. Kapur wanted to help the Firm without at the sametime breaking the rules of the Bank, what he must have intended in handing over the money to the Potdar was to constitute him as the agent of the Bank for the purpose of paying the money to the Firm of Manohardass Jainarain and taking simultaneously delivery of the goods and the documents of title relating to the goods from that Firm. There would have been no point in the Potdar accompanying the second defendant to Patna and carrying money along with him if he were not to be the agent of the Bank. It is the Firm's case that the second defendant did not go alone to the Bank on the morning of August 29, but that he went along with his servant Mahadeo. Two of them being together, they could surely not have wanted a third person to go along with them just for carrying the cash. We are therefore, of the opinion that the money not having passed into the actual custody of the Firm or that of the custody of a person who was a servant or agent of the Firm, the Firm cannot be held liable for it.

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In regard to s. 85 of the Negotiable Instruments Act, 1881 (26 of 1881) and the decision of *Jagjivandas, Jamnadas* v. *The Nagar Central Bank Ltd.*, (1), which is founded on that section upon which reliance was placed before the High Court, it is sufficient to say that before the provisions of s. 85 can assist the Bank, it had to be established that payment had in fact been made to the Firm or to a person on behalf of the Firm. Payment to a person who had nothing to do with the Firm or a payment to an agent of the Bank would not be a payment to the Firm. Section 118 of the Negotiable Instruments Act on which reliance was placed before us does not have any bearing upon the case at all.

It was then urged on behalf of the Bank that even assuming that the money was misappropriated by the Potdar the Bank could not be held responsible for his act because his act was a criminal act. In support of this contention the learned counsel relied upon the decisions in *Gopal Chandra Bhattacharjee* v. *The Secretary of State for India* (2), and *Cheshire* v. *Bailey* (3). The rule of law upon which these decisions are based is that the liability of the master for the misconduct of the servant extends only to the fraud of his servant committed in the course of his employment and for the master's benefit and that a master is not liable for the misconduct of the servant committed for the servant's own private benefit. It is difficult to appropriate how these cases are of any assistance to the Bank. Here, what the Bank wants to do is to fasten liability upon the Firm with respect to the amount for which it had drawn a cheque. Before the Firm could be made liable, the amount for which the cheque was drawn had to be shown to have been paid to the Firm. On the contrary it was handed over by the Bank to its Potdar avowedly with the object of paying it to the firm of Manohardass Jainarain, but was not in fact so paid by him. Assuming that he misappropriated the money how

(1) (1925) I.L.R. 50 Bom. 118. (2) (1909) I.L.R. Cal. 36 647.
(3) [1905] 1 K.B. 237.

can the Bank seek to hold the Firm of the defendants liable? This is not a case where the defendants are seeking to hold the Bank liable for a criminal act of one of its servants or employees. But it is a case where the Bank wants to fasten liability on the Firm for the criminal act of the Bank's own servant. Such a proposition is insupportable in law. For, vicarious liability may, in appropriate cases, rest on the master with respect to his servant's acts but it cannot possibly rest on a stranger with respect to the criminal acts of a servant of another. The principle on which the master's liability for certain acts of the servant rests is that the servant, when he commits such act, acts within the scope of his authority. If the servant was not acting within the scope of his authority, the master would not be liable and it is the person who did the particular act, that is the servant, would alone be liable. If a third party sustains damage or loss by reason of an act of the servant, he can hold the servant liable and also if the servant's act falls within the scope of his duties or authority, the master as well. That principle can obviously have no application for founding a liability against a stranger from whom the servant can in no sense be regarded as deriving any authority. We are, therefore, clear that whether the money had been misappropriated, by the Potdar or by the Manager, it is the Bank who is their employer that must bear the loss. The drawers of the cheque, that is, the Firm to whom no part of the money was paid by the Bank cannot be held liable to make it good to the Bank. For these reasons we affirm the decree appealed from and dismiss the appeal with costs.

Appeal dismissed.