THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2010] 2 SRI L.R. - PART 3

PAGES 57 - 84

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company (Printers) Ltd.

Price: Rs. 25.00

DIGEST

Page

It is clear from the above quoted proceedings of the Commercial High Court in this case that on 19th December 1998, when after the conclusion of the cross-examination and re-examination of witness Jayawardene, the case for the Appellant was closed by learned Counsel for the Appellant marking in evidence A1 to A52, *no objection was taken by Senior Counsel for Brooke Bond to the reception in evidence of the said documents,* and on the next date when Brooke Bond was expected to file its affidavit and/or call its witnesses, learned Senior Counsel for Brooke Bond had first informed Court that it is not intended to lead any evidence on behalf of Brooke Bond, and that it does not object to any of the documents of the Appellant except the ones marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49. Learned Senior Counsel for Brooke Bond also took the opportunity to correct the proceedings of the previous date, namely, that of 19th December 1995, and learned President's Counsel for the Appellant did not have any objections to these corrections, which fact was also recorded, after which learned Senior Counsel for Brooke Bond had closed the case for the Defence. It is trite law that as Samarakoon, C.J. observed in *Sri Lanka Ports Authority and Another v. Jugolinija – Boat East*[8] at 23-24, "if no objection is taken when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. " This is the cursus curiae of the original courts. See, *Silva v. Kindersle*[9]; *Adaicappa Chettiar v. Thomas Cook and Son*[10] *Perera v. Seyed Mohomed*[11]; *Balapitiya Gunananda Thero v. Talalle Methananda Thero*[12]; *Cinemas Limited v. Sounderarajan*[13]. Since the documents marked A1 to A52 had been read in evidence on 19th December 1998 at the close of the Appellant's case without any objection from Brooke Bond, they cannot legitimately

be objected to on the next date, particularly because serious prejudice could thereby be caused to the Appellant by the belated nature of the Objection. I therefore hold that the learned High Court Judge erred in sustaining the said objection.

The learned High Court Judge has also inexplicably failed to consider the implication of the fact that the belated objection to the admissibility of the Appellant's documents being confined to the documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49 which means that there were a large number of documents to which no-objection at all had been taken by Brooke Bond. In fact, documents marked A1 to A4, A9, A10, A14, A29, A30, A42, A43 and A50 to A52 were not objected to by learned Counsel for Brooke Bond even belatedly. It is noteworthy that when learned President's Counsel for the Appellant closed the case for the Appellant on 19th December 1997, no objection was taken on behalf of Brooke Bond to any of the documents marked A1 to A52 which were sought to be read in evidence. As such it was incumbent on the learned High Court Judge to consider whether on the basis of the admissions recorded, the contents of the affidavit of Jayawardene, and the aforesaid un-objected documents, it is possible to award one or more of the relief prayed for by the Appellant. The learned High Court Judge, regrettably, has not undertaken such an evaluation, and the only reason adduced in his judgment for not taking to consideration the affidavit of Jayawardene is that he "could not have had any personal knowledge relating to the several matters deposed to in the affidavit". The learned High Court Judge has formed this opinion on the basis of the very brief cross-examination of Jayawardene, in the course of which

it was elicited that the said Jayawardene had never been employed or had and any dealings with Brooke Bond or Eastern Brokers Ltd. However, the said cross-examination clearly clearly reveals that Jayawardene was the Managing Director of the Appellant Company since its incorporation in 1977, and was in the tea trade. Jayawardene has in paragraph 1 of his affidavit expressly declared that he deposed to the facts contained therein from his personal knowledge and from documents available to him, copies of which he has procduced marked A1 to A52. In his brief cross-examination of Jayawardene, leaned Senior Counsel for Brooke Bond made no endeavor to probe the extent of the witnesses personal knowledge of matters deposed to by him in the affidavit, and the strange proposition that he had absolutely no personal knowledge of any of such matters was never put to him in cross-examination. In these circumstances, I am of the opinion that it is not reasonable to conclude from this cross-examination that Jayawardene had no personal knowledge of the matters he had deposed to in the affidavit, and to refuse to consider the contents thereof in deciding the case at hand. I hold that the learned Commercial High Court Judge had no justification for the rejection of the affidavit of the affidavit in this manner.

I have at the commencement of this judgment summarized the facts admitted by the parties at the trial, and also summarized the primary issues regarding which the parties were at variance, and in view of my finding that the Commercial High Court had no justification in law for rejecting the affidavit of Jayawardene or any of the documents tendered with the said affidavit, the question arises as to whether if the rejected evidence had been received, the ultimate decision of the Commercial High Court would have been different. This is a

very material consideration particularly in the light of Section 167 of the Evidence Ordinance, which provides that –

> "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

Having examined the recorded admissions, the issues, as well as the documents marked A1 to A52, I am clearly of the opinion that had the learned Commercial High Court Judge taken the said documents into consideration, there was a strong likelihood that the Court would not have dismissed the application of the Appellant and would have granted one or more of the relief prayed for by the Appellant. I hasten to add that this is a view formed by me without the benefit of submissions of Counsel on the questions of intellectual property rights that arise in this case, and that therefore the Commercial High Court is free to arrive at its findings on the issues already raised, if they are adopted without objection, or on fresh issues that may be formulated by Court, at a fresh trial, For the aforesaid reasons, I am of the opinion that this case should be remitted to the commercial High Court for fresh trial.

Before parting with this judgment, I wish to add that although Notice of Appeal and Petition of Appeal in this case were issued respectively on 5th November 1999 and 17th December 1999, and the matter was first fixed for hearing

in the Supreme Court on 1st August 2003, argument has thereafter been repeatedly postponed in view of the submission made by learned President's Counsel for the Appellant, without any objection from the learned Counsel for Brook Bonds, that the outcome of the appeal then pending in the Court of Appeal in C.A. Appeal No. 961/91 (F), which arose from Brooke Bond's action against Akbar Brothers Exporters (Pvt) Ltd., would have a bearing on this appeal. However, there has been no intimation to this Court of the outcome of the said case, and the findings of the Court of Appeal in the said case could not be taken into consideration in determining this appeal.

Accordingly, I make order setting aside the judgement of the Commercial High Court of Colombo dated 22nd October 1999 and remitting the case back for fresh trial. I award to the Appellant a sum of Rs. 15,000 as the costs of this appeal.

BANDARANAYAKA, J. – I agree.

BALAPATABENDI, J. – I agree.

appeal allowed.
Trial de Novo ordered.

CEYLON COMMERCIAL BANK VS. CEYLON TOBACCO CO. LTD

COURT OF APPEAL
SALAM J.
CA 872/95 (F)
DC 93650/M
JULY 21, 2008

Bank – Customer relationship – Cheque forged – liability of the Bank to pay – Bills of Exchange Ordinance Section 24, Section 80 – Breach of duty of care? Conduct of the Bank – customer – account payee cheque – Paying in good faith – without negligence – burden to establish forgery on whom? Evidence Ordinance Section 114.

The Appellant Bank debited the respondent customer's currant with Rs. 5,926,786/- upon the presentation of 8 cheques. The respondent customer maintained that the debit entries made by the bank was wrongful, unlawful and made without authority or mandate of the customer – in as much as the cheques contained forged signatures of the authorized signatories – The Appellant Bank is liable to pay bank the aggregate amount on the cheques with interest.

The Appellant Bank contended that the disputed cheques were duly drawn and issued by or on behalf of the customer and appeared on the face to be so drawn, and that, the cheques were specially crossed with the endorsement "account payee" and the officers of the Bank acted in good faith and without negligence when they honoured the cheque. The Appellant Bank also contended that there was a breach of duty of care owed to it by the customer.

The District Court held against the Bank.

Held

Per Abdus Salam, J.

> "The burden of proof of the cheques issued not having been drawn and or issued or signed by the drawer was on the customer

notwithstanding the decision in Kolonnawa Urban Council case be it a authority or otherwise."

(1) Cheque which is the form of a mandate to the Bank to bear the signature which is the duty of the Bank to compare with the specime signature and in case the Bank finds the drawers signature on the cheque differ from the specimen signature that the Bank should not honour it. Even if the signature on a cheque is a clever forgery the Bank cannot debt the customer's account with the amount of the cheque, as it has no legal authority from its customer to part with the funds.

(2) It is trite law that the customer of a Bank would be precluded from suing the Bank for the recovery of the sum paid on a forged cheque if it can be proved that the customer was actually aware of the forgery and failed to disclose it to the Bank as a consequence of which the Bank has lost its right of action against the forger.

(3) According to banking practice when a cheque is crossed 'account payee' the collecting Bank only guarantees the fate of the cheque namely that the proceeds of the cheque would be credited to the 'payee'. Provisions of Section 80 of the Bills of Exchange Ordinance would apply only where a banker pays a genuine cheque which has been duly issued by its customer but credited to the account of some other person other than the correct payee due to a fraudulent endorsement.

(4) The respondent customer has done everything within its power to prevent the payment of any cheques referred to have gone missing and therefore cannot be said to have acted negligently or in a manner unbecoming of a customer or adopted the conduct which would estopped it from claiming the recovery of the funds paid out of its account upon presentation of the impugned chaques.

Per Abdus Salam. J.

"The Bank having admitted that they are in possession of the specimen signature card quite surprisingly did not produce the same at the trial for comparison by the handwriting experts..... Having considered the unusual mode of suppression of the

specimen signature cards, admittedly in the possession of the Bank I am compelled to justify the presumption impliedly drawn in the judgment of the District Judge that it has been so withheld by the Bank as the production of it could otherwise be prejudicial or adverse to the defence raised in the case."

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:-

(1) *Bank of Ceylon vs. Kolonnawa Urban Council* – 51 NLR 731 (distinguished)

(2) *National Westminister Bank vs. Barclays Bank International* – 1974 – 3 All ER 834

(3) *Greenwood vs. Martins Bank Ltd.* – 1933 Al 51

(4) *Brown vs. Westminister Bank Ltd* - 1964 Lloyds Report 187

Maithri Wickramasinghe for defendant – appeallant

Romesh de Silva PC with *Prasanna Jayawardene* for plaintiff-respondent.

March 16th 2009

ABDUS SALAM, J.

The Ceylon Tobacco Company Ltd (hereinafter referred to as the "Customer") was a current account holder and constituent of Ceylon Commercial Bank Ltd (hereinafter referred to as the "Bank"). In April 1984, the Bank debited the Customer's current-account with Rs. 5,926,786/-, upon the presentation of 8 cheques. The Customer maintained that the debit entries thus made by the Bank was wrongful, unlawful and made without authority or mandate of the Customer, in as much as the said cheques contained the forged signatures of the authorized signatories and therefore the Bank is liable to pay back the aggregate amount on the said 8 cheques together with interest.

Conversely, the Bank *inter alia* took up the stand that the disputed cheques were duty drawn and issued by or on behalf of the Customer and appeared on the face to be so drawn. Consequently, it pleaded by way of substantive defence that the cheques in question were duly paid and the account of the Customer was rightly debited. The Bank further attempted to maintain that the impugned cheques were specially crossed with the endorsement "account payee" and the officers of the Bank acted in good faith and without negligence when they honoured the cheques and made payment against them.

The Bank also attempted to attribute 'breach of duty of care' owed to it be by the Customer, as the latter had failed or delayed to inform the lack of authority or proper mandate emanating from the cheques in question, although the Customer had been dispatched with daily statements of accounts. Further the Bank alleged that the Customer had caused, committed or made the Bank to believe that the cheques were duly drawn, used, paid and debited to the Customer's account and that the Customer was therefore estopped from denying that the cheques were duly drawn, paid and debited. The matter of the dispute proceeded to trial before the learned district Judge on 20 issues 7 of which were framed at the instance of the Customer and the balance 13 on the suggestion of the Bank.

The relationship between the parties as Customer and Bank as alleged in the plaint was admitted. It was also undisputed that payments were made in respect of the purported cheques and cheque books of specially printed leaves were made available to the Customer for use in respect of the said account.

At the trial, on behalf of the Customer the witnesses who testified were as follows.

1. R. R. Kithulgoda (Wx-Security Manager of the Customer).
2. Palitha Perera (Chief Inspector of the Criminal Investigation Dept).
3. A.D.H. Samaranayake (Retired Government Examiner of Questioned Documents)
4. V. Gomez (Finance Manager of The Customer).
5. H. N. Jayathilake (Former Assistant Accountant of the Customer).
6. M. H. S. Mohamed (A Police Constable Attached to the Criminal Investigation Dept).
7 P. H. Manathunga (Government Examiner of Questioned Documents)

On behalf of the Bank the evidence of N. G. Sampath de Silva and M. C. A. Wijesekara was led, as they were the officers who authorized the payment of the 8 cheques in question. At the conclusion of the trial the learned judge held that the Bank was able to successfully establish that the disputed cheques had not been signed by or on behalf of the Customer and that the Bank was not entitled to debit the Customer's current-account and therefore held that the Bank is liable to make good the loss suffered by the Customer in connection with the payment of the 8 cheques. The present appeal has been preferred by the Bank, to have the findings, judgment and decree entered against it, set aside and to have the Customer's action declared as having been dismissed.

Initially the Bank raised a preliminary objection before me as to whether the learned district Judge had misdirected himself with regard to the burden of proof as has been raised in paragraph 10 (iv) of the petition of appeal. In terms of paragraph 10 (iv) of the petition of appeal, what has been complained of is an alleged misdirection touching upon the overall burden of proof in respect of the alleged cause of action. By order dated 10th May 2007, I was compelled to hold *inter alia* that there has been no substantial prejudice caused to the Bank, as the learned district Judge has not placed any type of initial burden on the bank to be discharged in order to have itself absolved from the liability of having paid on the alleged forged cheques. For purpose of completeness, let me refer briefly to the argument advanced on that occasion. The learned counsel of the Bank submitted that the decision of Dias J, in the case of *Bank of Ceylon vs. Kolonnawa Urban Counsel*[1], should not be treated as a binding authority, as regards the burden of proof, since the Customer had voluntarily undertaken in that case to discharge the initial burden to prove the allegation of forgery. In the circumstances I was compelled to make the following remark in my order dated 10 May 2007, the relevant portion of which is reproduced for the sake of easy reference.

> "in passing I would like to have it placed on record that, as the learned trial judge has not followed the principle, referred to by the appellant, the question whether the decision of Dias J, in Kolonnawa Urban Council case should be treated as a binding authority, for the proposition of law that, 'when a Bank sets up the genuineness of signature of a cheque which is alleged by the Customer to be forged, the initial burden of proof was on the defendant' should be considered in an appropriate matter."

As far as the judgment in this case is concerned, it is abundantly clear that the learned district Judge has approached the problem on the footing that the initial burden to establish an allegation of forgery was on the Customer. This approach adopted by the learned district Judge is in fact favourable to the Bank and the law relating to the burden of proof in relation to claims made by Customer against banking authorities, arising on the repayment of the funds debited against forged cheques needs to be laid down in a more satisfactory and authoritative manner, so that it will have a more convincing binding force. In view of the reasons exhaustively dealt in the order dated 10 May 2007, the question relating to the position taken up by the Bank that the learned district Judge had misdirected himself with regard to the burden of proof in this case does not arise.

It is appropriate at this stage to mention that the parties and the learned district Judge have treated and proceeded, right through the trial, on the assumption that the burden of proof of the cheques not having been drawn and/or issued or signed by the drawer, was on the Customer, notwithstanding the decision in Kolonnawa Urban Council case, be it a binding authority or otherwise.

Let me now consider the manner in which the Customer is said to have discharged the burden of proof, it has taken upon itself to establish the allegation that the cheques in question not being drawn/issued/signed by or on behalf of the Ceylon Tobacco Company Ltd.

In presenting the case of the Customer, 108 documents were produced in evidence marked as P1 to P 108. Documents marked as P1 to P8 were the impugned cheques. Documents

marked as P9 to P26 and P48 to P108 contained the specimen signatures of the authorized signatories obtained by witness Kithulgoda and by Criminal Investigation Dept.

The chief inspector attached to the Criminal Investigation Dept testified that he had independently obtained the specimen signatures of the alleged signatories of the cheques and submitted them to the government examiner of questioned documents. He categorically stated that the investigations carried out by them with the assistance of the examiner of questioned documents revealed that all 8 cheques, the genuineness of the signatures on them were the matter of controversy, were in fact forged.

A. D. H. Samaranayaka, who testified on behalf of the Bank had served at the Dept. of examinations of questioned documents since 1946 and later retired as the government examiner of questioned documents. In addition to his having served the government of Sri Lanka, he functioned as the Head of the Department of examiner of documents at the Federal police in Australia. He has obtained post graduate training in the field of questioned documents in United Kingdom and had been awarded with a U. N. fellowship to study the examination of questioned documents in the United Kingdom. Canada and United States of America. The witness has also served the government of Singapore and Malaysia, as an expert in the field of questioned documents. Having examined the purported cheques with the specimen signatures marked as P9 to P 26 and the cheque typewriting, witness Samaranayaka was of the firm view that the cheques in question had definitely been forged.

The evidence of V. Gomez (Finance Manager of The Customer Company) is of much significance as regards the

precautionary measures taken by the Customer Company with regard to the safekeeping to the cheques in question. His evidence was that the Customer Company had nominated authorized signatories to operate its account and the cheque books which were in bound form, had been kept in a safe under lock and key. The safe in which the cheque book had been kept had two keys which were separately kept in the custody of two officers.

It is quite important to note that by letters marked P34 and P35, the Customer had informed the Bank of the 8 cheque leaves that had gove missing from the cheque-book and instructed the bank to stop payment of the same. Even though the cheques had been paid prior to the letters P34 and P35, it should be remembered that the Customer had informed the Bank of the missing cheques almost two weeks after the cheques had been paid. The learned district judge's finding on this matter was that the Customer had immediately written to the bank as soon as it became aware of the missing cheque leaves. According to the trial judge the question of the Customer having drawn the cheques P1 to P8 in a careless manner did not arise. Further on the evidence placed before him the learned district Judge came to the definite conclusion that daily statements of accounts in the month of April 1984 had been neither dispatched by the Bank nor has it been received by the Customer. In the teeth of the above finding, it cannot be expected of the Customer to have kept the bank notified of the wrongful debits in question. However, the fact remains that the Customer has notified the bank at least by 17 April 1984 and thus put the bank on its guard against possible malpractices with regard to its account.

Both witnesses namely, V. Gomez and H.N. Jayathilaka who testified on Customer's behalf categorically denied

having signed the purported cheques that were wrongfully honoured by the Bank. The learned district Judge considered the evidence of P. H. Manatunga, the examiner of questioned documents as being of considerable importance towards the resolution of the dispute. According to witness P. H. Manatunga the cheques in question had not been signed by the officers who had the authority to sing them. He expressed no doubt whatsoever, that all 8 cheques carried the forged signatures of the officers who had the authority to sign them and was quite categorical and firm that the cheques in question had been nothing but a series of forgeries.

Upon the closure of the Customer's case the Bank called N. G. Sampath de Silva who had cleared the purported cheques P1, P3, P4, P6, P7 and P8. The payment on the cheques produced marked as P2 and P5 have been approved by another officer of the Bank named M. C. A. Wijesekara who also testified at the trial. Both of them attempted to adduce their own reasons as to what made them believe that the cheques contained the genuine signatures of the authorized signatories.

The learned judge having examined the evidence of V. Gomez and H. N. Jayathilake along with the evidence of the handwriting experts which evidence he considered as somewhat independent in nature, concluded that the Bank had failed to adduce evidence of any expert to show that the signatures appeared on the cheques concerned, were that of the authorized signatories. Further he commented adversely against the failure on the part of the Bank to produce the specimen signature card applicable to the current-account maintained by the Customer.

Witness Sampath de Silva of the defendant Bank admitted that the specimen signature cards containing the specimen signatures of the authorized signatories of the Customer were available with the Bank and whenever cheques were paid, the defendant Bank compared the signatures on the cheques against the specimen signatures to satisfy itself as to the authenticity of the signatures appearing on the cheques. Learned president's counsel commenting adversely against the conduct of the Bank for the failure to produce the specimen signature cards, quoted from the evidence of Sampath de Silva who stated that the Bank has not employed any experts to verify the authenticity of the signatures that appeared on the impugned cheques, in order to assess the credibility of the allegation made against the Bank. The commission to the handwriting experts to express an opinion as to the genuineness of the signatures that appeared on the cheques has been issued with the consent of the Bank. The opinion expressed by both handwriting experts being adverse to the bank, it could have moved for a counter commission, if necessary to counteract the opinion expressed by the handwriting experts so as to strengthen the position of the Bank. According to the Bank officials, no such steps have been taken by the banking authority, resulting in the opinion expressed by the handwriting experts who testified at the trail remaining uncontradicted.

Although it is not relevant, it may be appropriate at this stage to remember that the above finding of the learned district Judge, as I have referred to in my earlier order dated 10th May 2008, cannot be construed as the learned district having misapprehended the issue as one, where the Bank was obliged to discharge an initial burden by establishing the signatures on the impugned cheques being identical to that

of the authorized signatories of the Customer but merely an attempt to analyze and examine the evidence of both sides on a preponderance of evidence, being mindful of his own approach that the initial burden was on the Customer to establish that the signatures appeared on them were in fact forged, notwithstanding the decision in Kolonnawa Urban Council case.

On the question of the delivery of thousand cheques leaves by the Bank, the trial Judge's conclusion was that the Bank had failed to prove its assertion that it did in actual fact hand over the said thousand cheque leaves to the Customer,

Dealing with section 24 of the Bills of Exchange Ordinance the learned district Judge held that the cheques in respect of which payment had been made by the Bank were not valid and on account of that alone the plaintiff cannot be said to have conducted itself in a manner unbecoming of a Customer of the Bank. Section 24 of the Bills of Exchange Ordinance provides that…. *"Where the signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly ioperative….. and no right to enforce payment thereof against any part can be acquired through or under that signature."*

Therefore it would be seen that the clear finding of the learned district Judge on the question of the validity of the impugned cheques is that they are merely a few sham pieces of paper in as much as the cheques contained the forged signatures said to be that of the authorized signatories. This principle has been enunciated in the case of *National Westminster Bank vs. Barclay's Bank Interational*[2]. In the

case of *Bank of Ceylon vs. Kolonnawa Urban Council (Supra)* Supreme Court held that where a chaque is forged, it is totally inoperative. Arising on the above principle of law it would be seen that the bank has no rights whatsoever to debit the account of the Customer against a forged cheque, as long as the account holder is not guilty of conduct unbecoming of a Customer. In this respect it would be of immense use to cite the principles laid down by Lord Tomlin in the case of *Greenwood vs Martin's Bank Ltd*[3]. The Bank in its written submissions tendered in the district Court has summarized the essential features of the principles of estoppels laid down by Lord Tomlin in the following manner.

1. A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom representation is made;

2. An act or an omission resulting from the representation whether actual or by conduct, by the person to whom representation is made.

3. Detriment to such person, as a consequence of the act or omission.

In the case of *Greenwood* the facts that the wife of the Customer of a Bank forged the signature of her husband on 44 cheques drawn on the husband's account. Upon the husband becoming acquainted with the forgery, the wife requested the former not to disclose it to the Bank on the undertaking that the funds that may be debited against the husband's account as a result of the presentation of the forged cheques would be returned to the husband's sisiter-in-law, namely the sister of the person who forged the signature on the 44 cheques. Upon realizing that the money promised

through the sister-in-law was not forthcoming, the husband threatened the wife that he would inform the bank but in fact it did not do so. By reason of the threat held out by the husband the wife shot herself. When the husband sued the bank for the recovery of the funds paid out on the forged cheques, the Bank took up the defences of ratification, adoption and estoppel. The House of Lords held that when the husband came to know of the forgeries, it was his legal duty to inform the bank. It was held that the detriment to the bank was that it could not avail itself of its rights of action against the forger (wife of the Customer) prior to her committing suicide.

In that case it was contended on behalf of the husband that the initial negligence was on the part of the bank to have honoured the forged cheques. The answer to this allegation made against the bank by Scutton L.J, was that although the carelessness of the bank was a proximate cause of the bank's loss in paying the forged cheques, it was not the proximate cause of the Bank losing its right of action against the forger because the failure of the husband to inform the Bank of the forgery until the death of the wife prevented the Bank from suing her for the recovery of the money.

In the case of *Brown Vs. Westminister Bank Ltd*[4] the issue was the behavior of the Customer representing the Bank that the cheques already paid were genuine and that it induced the Bank to pay future cheques. This type of conduct too was considered to be a bar to make a claim against the bank arising from the debit entries made in respect of the forged cheques.

It is suitable at this stage to refer to Gupta on "Banking Law in Theory and Practice" (2nd edition – 1992) Chapter

24 – page 349. According to Gupta "Whenever a person is maintaining an account with the Bank, one of the usual incident relating to the services rendered by a Bank is that the cheques which are issued by the Customer are honoured by the Bank on presentation subject to the condition that there are no other problems such as the non-availability of the funds in the account. The next question is that the cheque which is the form of a mandate to the Bank to bear the signature which is the duty of the Bank to compare with the specimen signature and in case the Bank finds the drawer's signature on the check differ from the specimen signature supplied to the Bank then the Bank should not honour it. Even if the signature on a cheque is clever forgery the Bank cannot debit the Customer's account with the amount of the cheque, as it has no legal authority from its Customer to part with the funds. Even the statutory protection to a banker is out of question. Since it is not signed by the maker Section 5 of the Negotiable Instruments Act, is not applicable and therefore it is not a cheque or a negotiable instrument or a bill and the various provisions of the Negotiable Instruments Act are not applicable. The only defence for the banker is the defence which flow from the general law of the land and is governed by the principles of estoppel or ratification"

The fact that the Customer informed the Bank of the real situation immediately upon the discovery of a possible attempt to forge the cheques was considered by the learned district Judge as being favourable to the Customer. To quote him, he observed that the Bank had failed to establish the receipt of daily statements in the month of April 1984.

It is trite law that the Customer of a Bank would be precluded from suing the Bank for the recovery of the

sum paid on a forged cheque, if it can be proved that the Customer was actually aware of the forgery and failed to disclose it to the Bank as a consequence of which the Bank has lost its rights of action against the forger.

As has been observed by the learned district Judge the failure on the part of the Bank to prove that daily statements for April 1984 had not been sent, does not make it incumbent or casts a duty on the Customer to inform the Bank of the wrongful debit thus made, as the Customer would not have had any knowledge of such debits being made against its account, on the presentation of the 8 cheques. It is only if daily statements had been sent, the Customer can be expected to detect the wrongful debit.

As regards the dealings of the Customer with the Bank the evidence led at the trial had shown that the cheques drawn by the Customer were properly and carefully written using a cheque typewriter and the Customer Company has instructed the Bank over the phone on matters relating to the missing cheque leaves. Thus, on the question pertaining to negligence, the learned district Judge held in no unambiguous language that the Customer has displayed no negligence with regard to its dealing with the Bank in relation to the matter complained of.

On behalf of the Bank it was submitted that the cheques having been paid in April 1984, the Customer ought to have contacted it on the matter, much prior to the date on which it had in fact contacted. In this connection, the Bank has drawn my attention to P 36 written on 4 June 1984. No doubt there had been some delay on the part of the Customer to have informed the Bank **in writing** of the payment made in

respect of the impugned cheques. However a perusal of the documents produced at the trial clearly shows that at least by 17th April 1984, the Customer has informed in writing of the disappearance of at least six cheque leaves from the cheque-book. In the circumstances, in my opinion the learned district Judge cannot be faulted for arriving at the conclusion that there had been no delay on the part of the Customer to have kept the Bank informed of the missing cheque leaves, even though as at 17 April 1984 payment on the impugned cheques had already been made.

The question that arise here is not whether the Customer had informed the Bank of the missing cheque leaves prior to its account being debited against the said amounts mentioned in the 8 cheques but whether the Customer had informed the Bank of this position immediately upon the discovery of the same, since the Bank is not entitled to any protection against payments made on any forged cheques, as long as the Customer in not found to be guilty of negligence in maintaining the Bank account. As has been clearly held by the learned district Judge the Customer's conduct in maintaining the account does not demonstrate any negligence on its part. In the circumstances, if there be a delay that has been properly and satisfactorily accounted for then the Customer cannot be accused of conduct unbecoming of an account holder and therefore the Bank cannot take any undue advantage of the delay of seven days that have occurred in keeping the Bank informed of the missing cheque leaves.

Looking at the unfortunate incident from another point of view, emphasis should be made of the fact that the district Judge has accepted the evidence of V. Gomez who

claimed that he informed the Bank over the phone as to the missing cheque leaves prior to the payment of the impugned cheques. This evidence of V. Gomez does not appear to have been countered by the Bank and therefore remained uncontradicted.

Be that at it may, the pivotal question in this appeal turns on the determination of the trial judge that P1 to P8 were not drawn and/or issued or signed by the Customer or on its behalf by the authorized signatories. As far as the finding of facts and the observation of the credibility of the witnesses are concerned, the learned district Judge had opted to rely on the evidence of the officers who testified on behalf of the Customer and that of the renowned handwriting experts and rejected the version of the Bank for reasons properly addressed by him. He has been influenced by several reasons in coming to the conclusion. The reasons which appear on the face of the judgment and also implied therein can be summarized as follows.

1. The fact that the officers of the Customer gave evidence disclaiming that they never signed the cheques in question.

2. Their evidence on that matter being corroborated by reputed handwriting experts whom the learned district Judge rightly considered as independent witnesses of unquestionable competence on the particular are of skill to express an opinion as to the genuineness of signatures and writings.

3. The failure on the part of the Bank to counter the opinion expressed by the said handwriting experts in a manner satisfactory to court.

4. The unsatisfactory nature of the evidence given by the officers of the Bank in relation to the manner in which the signatures on P1 to P8 had been examined and verified.

5. The failure on the part of the Bank to produce the specimen signature cards of the authorized signatories, which if produced could have been reasonably be held as adverse to the Bank.

6. The failure to the Bank to adduce any reason as to what prevented it from producing the specimen signature cards.

7. The course of practice adopted by the Customer to draw cheques by means of a cheque typewriter.

8. The uncontradicted position of the Customer that it had never drawn cheques in favour of individuals, in large sums of amounts, as it reflected in P1 to P8, except in the case of payments made to the Inland Revenue Dept.

9. The fact that P1 to P8 had been drawn in favour of individuals.

10. The failure on the part of the Bank to prove that it had given notice of daily statements of accounts pertaining to the month of April 1984.

The Bank submitted to the learned district Judge that it was protected by section 80 of the Bills of Exchange Ordinance in relation to the causes of action pleaded in the plaint. Section 80 of the Bills of Exchange Ordinance provides that where a banker on whom a cross cheque is drawn, in good

faith and without negligence pays it, if crossed generally, to a banker, and if crossed especially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheques had been made to the true owner thereof.

P1 to P8 bear a special crossing "Account Payee – Not Negotiable". P1, P4 and P8 had been presented for payment through the People's Bank which had acted as the collecting Bank and P2, P5 though Bank of Ceylon, P3, P6 and P7 through Grindlays Bank. According to banking practice when a chaque is crossed "Account Payee", the collecting Bank only guarantees the fate of the cheque namely that the proceeds of the cheque would be credited to the payee in whose favour the special crossing "Account Payee" has been made. As regards the protection claim by the Bank, in terms of section 80 of the Bills of Exchange Ordinance the learned president's Counsel of the Customer has urged that such provision would apply only where a banker pays a genuine cheque which has been duly issued by its Customer but credited to the account of some person other that the correct payee due to a fraudulent endorsement. Hence, he contended that section 80 of the Bills of Exchange Ordinance has no application to the present case. It this connection the Learned President Counsel had quoted the statement of law from Paget's Law of Banking (10th Edition) at page 206, where it is stated that "the banker is not protected if he acts upon forged or unauthorized payment". I have no reservation whatsoever in endorsing the view expressed by the Learned President's Counsel, as being the correct legal position.

Relying on the above principle, the Bank has submitted that the cheques were paid according to the drawing to a banker and indeed they were crossed "account payee" to the payees account and the same has been paid in good faith after the examination of the signatures on the cheques under ultra violet lights and therefore there cannot be any negligence on the part of the Bank in having paid out the cheques in question.

Significantly the number assigned to the account of the Customer is 1. The account has been in operation from 1975. The Customer claimed that the Kotahena branch of the defendant Bank was opened in 1975 and Ceylon Tobacco company was the first Customer open up an account at that particular branch. One of the officers who had authorized payment of some of the impugned cheques had served at the Kotahena branch for a short period of one month or less.

The defendant having admitted that they are in possession of the specimen signature cards, quite surprisingly did not produce the same at the trial for comparison by the handwriting experts. Learned president's counsel of the Customer has persistently argued that this is a classic case where the presumption set out in illustration (f) of section 114 of the Evidence Ordinance should be drawn. He contends that the Bank refrained from producing the specimen signature cards as the signatures appear on it would be undoubtedly different from the signatures appearing on P1 to P8. Having considered the unusual mode of suppression of the specimen signature cards, admittedly in the possession of the Bank, I am compelled to justify the presumption impliedly drawn in the judgment of the learned

district Judge that it has been so withheld by the Bank, as the production of it could otherwise be prejudicial or adverse to the defence raised in the case.

As regards the manner in which the Customer has operated its account, learned president's counsel has submitted that Ceylon Tobacco Company has conducted its affairs in a sensible and businesslike manner which was far cry from the "amazing state of affairs which savours more of a comic opera" which apparently prevailed in the Kolonnawa Urban Council as described by Dias J, in *Bank of Ceylon vs. Kolonnawa Urban Council (supra).* Learned president's counsel has adverted me to the fact that even in the Kolommawa Urban Council case, the Supreme Court held that the "amazing state of affairs" did not prevent the Kolonnawa Urban Council to recover the sums paid upon forged cheques by the Bank of Ceylon.

In the circumstances as has been contended on behalf of Ceylon Tobacco Company Ltd, the plaintiff-repondent in this appeal, it cannot be possibly be held to have been guilty of negligence which directly led the defendant-appellant Bank to pay the purported cheques marked as P1 to P8 or which would estop the plaintiff-respondents claim against the defendant – appellant in this case.

On a consideration of the totality of the evidence led at the trial, I am inclined to think that the plaintiff (Ceylon Tobacco Company Ltd) has done everything within its power to prevent the payment of any cheques reported to have gone missing and therefore cannot be said to have acted negligently or in a manner unbecoming of a Customer of a Bank or adopted the conduct which would estop it from claiming

the recovery of the funds paid out of its account upon presentation of the impugned cheques.

For the foregoing reason I am of the opinion that the learned district Judge cannot be faulted for the decision that he has arrived at or that it could be branded as perverse or ended up in a miscarriage of justice. Hence, I am not inclined to accept the present petition of appeal. The petition of appeal of the defendant-appellant (Ceylon Commercial Bank Ltd) therefore stands dismissed subject to costs.

Judgment of the learned district Judge dated 21 October 1995, inadvertently stated in the decree as being dated 21 September 1995 stands affirmed.

appeal dismissed.