

HATTON NATIONAL BANK

v.

TILAKARATNE

COURT OF APPEAL
WIGNESWARAN, J.
TILAKAWARDANA, J.
C.A. 693/97(F)
D.C. COLOMBO 13895/MR
SEPTEMBER 07, 2000
NOVEMBER 10, 2000

Wrongful dishonour of cheque - Liability of Bank - Duty of care - Damages - Not limited to actual pecuniary loss - Substantial damages - To be proved.

The Plaintiff Respondent instituted action against the Defendant Appellant Bank claiming damages for the return of the cheque for Rs. 35,000/= by the Bank, with the endorsement 'Exceeds Arrangement' despite adequate funds being available in the said account.

The Defendant Appellant Bank accepted that they had mistakenly dishonoured the aforesaid cheque.

The District Court awarded Rs. 750,000/= as damages with interest.

Held :

- (i) Wrongful dishonour of the customer's cheque makes the Bank liable to compensate the customer on contractual obligations as well as for injury to his creditworthiness. A return of a cheque would cause injury to the drawers reputation.
- (ii) Quantum of Damages is not limited to the actual pecuniary loss sustained by reason of such dishonour. When the customer is a trader he is entitled to claim substantial damages even if he had suffered no actual pecuniary loss sustained by such dishonour, if he can show that his creditworthiness had suffered by the dishonour of the cheque.
- (iii) A non trader is not entitled to recover substantial damages unless the damage he has suffered is alleged and proved as special damages, otherwise he would be entitled to nominal damages.
- (iv) The Plaintiff's evidence on the transaction was vague, nebulous and indeterminate and further he had not proved any actual or special

damages, unless special damages are claimed and proved nominal damages will be awarded.

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to :

1. *Gibbons v. Westminster Bank* - 1939 3 All ER 577
2. *Harris v. Amery* - LR 1 CP 148
3. *Luna Park (NSW) Ltd., v. Tramways Advertising Pte Ltd.,* - 1938 61 CLR 286
4. *Evans v. London and Provincial Bank* - 1917 3 LDAB 152

S. A. Parathalingam P.C., with L. B. J. Peiris for Defendant - Appellant.

S. J. Mohideen for Plaintiff - Respondent.

Cur. adv. vult.

January 16, 2001.

SHIRANEE TILAKAWARDANE, J.

This Appeal had been preferred by the Defendant Appellant against the Judgement of the Additional District Judge, Colombo dated 30. 09. 1997 wherein he had held in favour of the Plaintiff, awarded a sum of Rs. 750,000/- as damages with interest until full payment and costs.

The Plaintiff instituted action against the Defendant claiming damages for the return of the cheque bearing No: 210236 (P2) for a sum of Rs. 35,000/- by the Manager of the Kirillapone Branch, with the endorsement "exceeds arrangements," despite adequate funds being available in the said account.

The Defendant Bank accepted that they had mistakenly dishonoured the aforesaid cheque. The Bank explained that the error had occurred due to the increase of the overdraft facility that had been afforded to the Plaintiff. Originally, on 05. 10. 1992 the limit of the overdraft as against the security of a savings deposit of Rs. 100,000/- was limited to Rs. 73,000/- but thereafter on 01. 12. 1992 as against the security of a savings certificate of Rs. 250,000/- **it was increased by an additional**

183,000/-. When the cheque was presented according to the entries of the Bank at 12.26 p.m. on 29. 12. 1992, encashment had not been approved as the records of the Bank had mistakenly reflected that overdraft facility had been increased to Rs. 183,000/-, when in fact it had been increased to Rs. 256,000/- (Rs. 73,000/- + Rs. 183,000/-). The Bank had omitted to take into account the total credit balance of the Plaintiff. When appraised of their error the Bank had intimated to the Plaintiff customer that the cheque could be presented again. However the Plaintiff had issued a fresh cheque No: 210237 (P1) for the same amount and that cheque had been presented at 1.45 p.m. and had been immediately encashed.

It is common ground that the cheque was originally dishonoured allegedly due to a bona fide error of the Defendant Bank. There is no gainsaying that upon its contractual obligations the Bank has a duty of care to its customers and this duty must be performed without negligence. Such a duty of care is an implied term of the Banking contract. According to the particulars relevant to this case the matter to be determined is the consequences of the wrongful dishonour of the cheque.

Wrongful dishonour of the customer's cheque makes the Bank liable to compensate the customer on contractual obligations as well as for injury to his creditworthiness. There is no doubt that a return of a cheque would cause injury to the drawer's reputation.

In so far as the damage to goodwill of the business of the Plaintiff, there is no evidence except the Plaintiff's merely say so. No other evidence to support such damage had been led. Although he had said that other traders were not inclined to deal with him, no evidence to support this allegation of his was placed before the District Court. Loss of reputation in any event, even according to his own evidence was confined to the broker and bears no nexus to the goodwill of other traders. Therefore the fact that the Bank had failed in its duty of care has been proved by the Plaintiff, but not the quantum of damages.

In considering the question of the quantum of damages, it is not limited to the actual pecuniary loss sustained by reason of such dishonour. When the customer is **a trader** he is entitled to claim **substantial damages**, even if he had suffered no actual pecuniary loss sustained by such dishonour, if he can show that his creditworthiness had suffered by the dishonour of the cheque. But a **non-trader is not entitled** to recover substantial damages unless the damage he has suffered is alleged and proved as special damages. Otherwise he would be entitled to nominal damages. (*Gibbons v. Westminster Bank*⁽¹⁾).

A trader is defined as a person who lives by buying and selling merchandise. A 'business' has a more extensive meaning than the word 'trade' (per Willis J. in *Harris v. Amery*⁽²⁾ - cited in Stroud's Judicial Dictionary 5th Ed. Page 323)

According to the Plaintiff dated 29. 09. 1993, the claim for damages was based on the Plaintiff's assertion that he was a businessman who dealt with both local and foreign clientele, and that his dealings were established on the basis of his goodwill and creditworthiness. By the aforesaid dishonour, his goodwill and creditworthiness had been tarnished, and furthermore that his reputation amongst the business fraternity as well as society had been affected.

The evidence the Plaintiff led regarding his "business" was his own testimony. He asserted that he originally ran an employment agency. This did not make him a trader. He stated that he was thereafter in the Tea trade and Garment industry, but qualified it with the assertion that it was in the capacity of a Director in 3 such establishments.

However, he later described himself as an "exporter" and that the cheque was given to a broker Mr. Perera. The Plaintiff was emphatic that the broker had informed him that the factory owners had wanted payment to be made before 12.00 o'clock

(vide page 93 of the record.) Mr. Perera's presentation of the cheque to the Bank which had been recorded at 12.26 p.m., a fact that was not even challenged therefore remains inexplicable. When P1 was finally encashed at 1.45. p.m. Mr. Perera's acceptance of the Rs. 35,000/- in cash (page 91 of the record), when he had already been communicated the finality of the deadline, was even more puzzling. In any event if the transaction had been so definitely to be concluded before noon and such was within the knowledge of the Plaintiff, the reissue of the cheque P2 and the handing over of the cash to the Broker after the fixed time cannot be logically resolved.

Most significant also was the failure of the Plaintiff to call Mr. Perera who had been listed as a witness, (Vide list of witnesses dated 01. 09. 1994). This witness's evidence would have been useful to establish the enormous loss of almost 2 million which had been allegedly suffered by the Plaintiff due to other Traders "dishonouring" cheques issued by him, pursuant to this incident. Furthermore, though the plaintiff had undertaken to call one Mohideen as a witness to testify to his loss, he failed to act in terms of this undertaking.

As regards the transaction itself, the evidence given by the Plaintiff with regard to the actual transaction was vague. The Plaintiff could not describe the designs of the jacket nor the quantity ordered. Documents were not produced, nor were any specific details of any part of the transaction elicited in evidence. The Plaintiff specifically stated that the jackets were to be sent for sale as winter clothes **for December 1992**. P2 according to the Plaintiff was a deposit for the exportation of the said winter garments. Assuming that the cheque P2 dated 29. 12. 1992 was a deposit as described by the Plaintiff, the jackets certainly would not have reached the seller in time for winter sales during December 1992. It is improbable and unlikely that the exportation of winter jackets for sale **in December** would have been transacted in order that the jackets would reach the seller **after December**. The evidence given regarding the transaction for which the cheque had been issued therefore does not bear

up to close scrutiny, especially regarding any specific details of the transaction itself. The Plaintiff's evidence on the transaction itself was vague, nebulous and indeterminate.

The Plaintiff had also not proved any actual or special damages by reason of wrongful dishonour of the cheque. Unless special damages are claimed and proved nominal damages will be awarded. (*Luna Park (NSW) Ltd. v. Tramways Advertising Pty. Ltd*⁽³⁾ *Evans v. London and Provincial Bank*⁽⁴⁾).

In assessing the quantum of damages, in the case of *Gibbons v. Westminster Bank Ltd. (Supra)* approximately 1/4th of the value of the cheque was given as nominal damages. The nominal damages of injury to reputation, due to the dishonour of the cheque presented by the broker, would according to the facts of this case amount of Rs. 8,750/-.

This is specially so as the Plaintiff had led no evidence to show that the effect of the dishonouring of the cheque went beyond the broker.

In all these circumstances, we set aside the Judgment of the Additional District Judge, Colombo dated 30. 09. 1997 in so far as the quantum of damages that had been awarded and award damages in a sum of Rs. 8,750/-. The Appeal is dismissed subject to this Variation to the sum awarded as damages. We make no order as to costs.

WIGNESWARAN, J. - I agree.

Appeal dismissed

Quantum of damages reduced.