# THE HIGH COURT OF SINDH, KARACHI

Present:
Chief Justice &
Mr. Justice Adnan Iqbal Chaudhry.

**C.P. No. D – 6912 of 2022**
[United Bank Ltd., versus Federation of Pakistan & others]

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| Petitioner | : | United Bank Limited through Mr. Shahan Karimi, Advocate. |
| Date of hearing | : | 11-08-2023 |
| Date of short order | : | 11-08-2023 |
| Date of reasons | : | 17-08-2023 |

## ORDER

**Adnan Iqbal Chaudhry J. –** By a short order dated 11-08-2023 we had dismissed the petition. These are the reasons for that dismissal.

2. The Petitioner **[Bank]** is aggrieved of order dated 15-12-2021 passed by the Banking Mohtasib under section 82D of the Banking Companies Ordinance, 1962 **[BCO]**, and the affirming order dated 04-08-2022 passed by the President of Pakistan on the representation of the Bank under section 14 of the Federal Ombudsmen Institutional Reforms Act, 2013 **[FOIRA]**. The impugned orders hold the Bank liable to pay back the Respondent No.3 **[Complainant]** the amount debited from his account for cheques forged by the employee of the Complainant. The operative part of the Mohtasib's order is as follows:

> "In view of above observations, it is established that the Bank had paid forged cheques which are a 'nullity' in law, confer no title, under clause 29-B of the Negotiable Instruments Act, 1881. Further, the Bank did not comply their own SOPs in case of payment of cheque (Para 9 above). Thus, the Bank committed gross negligence in payment of the disputed cheques under the law and their own SOP. Therefore, I under the power vested in me vide Section 82D of the Banking Companies Ordinance, 1962 read with Section 9 of the Federal Ombudsmen Institutional Reforms Act, 2013 (XIV of 2013), direct the Bank to make good the loss by crediting the Complainant's account with a sum of Rs. 5,490,000/- forthwith."

3. The facts leading to the complaint before the Banking Mohtasib were that on 13-09-2019, the Complainant suspecting that a recently engaged employee namely Jamaluddin, had stolen a signed cheque of Rs. 75,000/- from the Complainant's office, instructed the Bank to stop payment, which was done by the Bank. On 23-09-2019, the Complainant received a call from the Bank to verify whether he had issued a cheque of Rs. 3,000,000/-, which he denied. An alarm being raised, the Complainant inspected his cheque book to discover that 4 unused leaves were missing therefrom. On 24-09-2019 he lodged an FIR against Jamaluddin, and on 25-09-2019 he instructed the bank to stop payment on those 4 cheques. However, by that time 2 of those cheques had already been cleared by the Bank for transfer to the account of Jamaluddin. The first cheque of Rs. 490,000/- was cleared on 17-09-2019 and the second cheque of Rs. 5,000,000/- was cleared on 19-09-2019 **[the disputed cheques]**.

4. The case of the Complainant was that his signature on the disputed cheques had been forged by Jamaluddin; and that the Bank had never called the Complainant to authenticate the cheques as per its SOP when the amount involved is substantial.

5. On an internal inquiry, the Bank referred the disputed cheques alongwith the recent signatures of the Complainant to a handwriting expert, who opined that the Complainant's signatures were clearly forged. This report of the handwriting expert was not disputed by the Bank before the Mohtasib, *albeit* it was submitted that the forgery could not have been detected with the naked eye in the normal course of business while processing hundreds of cheques. Having seen the two sets of signatures ourselves, (appended to the report of the handwriting expert), the variation in signatures was sufficient for a banker to have raised a red flag, the more so when those signatures are now viewed over a computer monitor capable of enlargement and not with the naked eye.

6. Under the circumstances where it was not a disputed fact before the Banking Mohtasib that the disputed cheques were forgeries, we do not see the point in the argument that the Mohtasib did not formally record evidence. In any case, the summary nature of proceedings before the Banking Mohtasib has already been discussed by this Court in *Muslim Commercial Bank v. Federation of Pakistan* (PLD 2019 Sindh 624). The argument that the matter was in the exclusive domain of a civil court does not appreciate sub-section (5) of section 82B of the BCO which empowers the Banking Mohtasib to address "fraudulent or unauthorised withdrawals or debit entries in accounts", also an aspect dealt by the case of *Muslim Commercial Bank supra*.

7. Before the Banking Mohtasib it was also not disputed by the Bank that its in-house clearing rules envisaged a *'Call Back Procedure'* to authenticate cheques exceeding a certain amount. These rules exist pursuant to instructions issued by the State Bank of Pakistan as *'Guidelines for Clearing Operations'*. SOP No.15 placed on the record stipulates that: *"All cheques that are drawn on a UBL account and received at CPU for clearing and are meeting the call back threshold amount, the same must be authenticated by calling the account holder by the respective branches BM/CSOM/CSR."* Per the impugned order, the threshold applicable to the Complainant's account was Rs. 500,000/-. On the other hand, the case of the Bank was that said SOP was for internal use only, and it was not mandatory to follow it each time lest the underlying transaction of the customer is delayed in the process. But then, at the same time, it was acknowledged by the Bank that it had called the Complainant to authenticate a cheque of Rs. 3,000,000/- and yet the same procedure was not followed for the disputed cheque of Rs. 5,000,000/-. It was not the case of the Bank that it was usual for the Complainant to draw cheques of around Rs. 500,000/-.

8. Given the foregoing facts, the Banking Mohtasib was justified in concluding that the Bank was negligent in clearing the disputed

cheques and in not observing its own SOPs to authenticate the signatures of the Complainant on the disputed cheques.

9. The provision on which the Banking Mohtasib relied for holding the Bank liable for the Complainant's loss is section 29B of the Negotiable Instruments Act, 1881, which provides:

> "**29B. Forged or unauthorized signature.---** Subject to the provisions of this Act, where a signature on a promissory note, bill of exchange or cheque is forged or placed thereon without the authority of the person whose signature it purports to be, the forged, or unauthorized signature is wholly inoperative, and no right to retain the instrument or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the instrument is precluded from setting up the forgery or want of authority:
>
> Provided that nothing in this section shall effect the ratification of an unauthorized signature not amounting to a forgery."

10. Therefore, in view of section 29B, a cheque that is forged with the signature of the purported drawer does not operate against him, nor does it give any right to the drawee/bank to give a discharge therefor, the exception being a case where the drawer is precluded from pleading forgery. On the underlying principle, there is a string of cases that have held the bank liable to pay back the customer the amount paid out on a forged cheque. The first in that series is *Province of Sindh v. Imperial Bank of India* (PLD 1961 Karachi 185), a judgment prior to the enactment of section 29B. After that enactment, the cases that followed were *Atlas Battery Limited v. Habib Bank Limited* (PLD 1987 Karachi 599); *Ansar Ahmed v. Bank of America* (PLD 1975 Karachi 252); and *Abdur Rehman v. City Bank N.A.* (1990 CLC 686). Even in India, where the Negotiable Instruments Act did not contain a provision as specific as section 29B, the same principle was applied by the Supreme Court of India in *Canara Bank v. Canara Sales Corporation* (AIR 1987 SC 1603).

11. The ratio in the aforesaid cases for holding the bank liable is that in the case of a forged cheque there is no mandate with the bank

to debit the customer's account, and the person in possession of such cheque is not a 'holder in due course' within the meaning of section 9 of the Negotiable Instruments Act. In Canada as well, banks are held liable to their customers for making payment on an unauthorized cheque. The underlying principle there was expressed as follows by the Supreme Court of Canada in *Teva Canada Ltd. v. TD Canada Trust, 2017 SCC 51 :*

> "The Bills of Exchange Act should be interpreted in such a way that drawers and banks are exposed to the risks created by the fraudulent use of the system, but the banks are the more significant beneficiaries of the bills of exchange system. It is therefore appropriate, in certain circumstances, for them to bear risks and losses associated with that system. To allocate losses to the drawer for having failed to identify and detect the fraud is inconsistent with the strict liability tort of conversion, which makes any negligence on the part of the drawer or the banks in preventing the fraud irrelevant."

12. Adverting to the exception in section 29B of the Negotiable Instruments Act, the bank can avoid liability if it can demonstrate that the customer is precluded from pleading forgery. In the instant case, the Bank had urged before the Mohtasib that it was the Complainant himself who was negligent in the safe-keeping of his cheque book, which enabled his employee to commit the forgery, and thus the Complainant was precluded from pleading forgery. That exact argument was rejected in *Imperial Bank (supra)* after holding that negligence of the customer in the safe custody of his cheque book does not avoid liability of a bank that itself acted negligently in making an unauthorized payment; and that, to avoid such liability the conduct of the customer should be such which induced the bank to act upon the purported signature without negligence on its part. A similar view was expressed in *Canara Bank*, *viz.* that in support of a plea of estoppel on the ground of negligence, the bank must show that the customer owed a duty to the bank; whereas in such cases there is no duty on a customer to inform the bank of the fraud committed on him of which he was unaware. In *Ansar Ahmed* it was further observed that if the bank is negligent in making payment on a forged cheque, it is not a 'payment in due course' as section 10 of the

Negotiable Instruments Act requires such payment to be one that is in good faith AND without negligence. We find ourselves in agreement with these views, and which apply squarely to the case before us. Accordingly, even if the Complainant had failed to keep his cheque book in proper care, that does not absolve the Bank of its negligence in clearing forged cheques and does not raise the exception to section 29B of the Negotiable Instruments Act, 1881.

13. Learned counsel had then attempted to argue that along with the account-opening form the Complainant had signed an undertaking that he shall remain responsible for all transactions, be those unauthorized, until intimation is given to the Bank. The record does not show whether that ground was pleaded or urged by the Bank before the Banking Mohtasib. In any case, we do not see how such an undertaking by the Complainant can be construed as waiving an action for the Bank's negligence.

14. Having seen that the Banking Mohtasib had jurisdiction to decide the complaint, that his findings are based on admitted facts, and that the order so passed by him is supported by the law, we see no reason to interfere with the impugned orders in writ jurisdiction. The petition was therefore dismissed by a short order.

**JUDGE**

**CHIEF JUSTICE**

Karachi:
Dated: 17-08-2023