

**2 SCOB [2015] AD 8**

**APPELLATE DIVISION**

**PRESENT**

**Mr. Justice Md. Muzammel Hossain,**  
*Chief Justice*

**Mr. Justice Surendra Kumar Sinha**  
**Mr. Justice Md. Abdul Wahhab Miah**  
**Ms. Justice Nazmun Ara Sultana**  
**Mr. Justice Syed Mahmud Hossain**  
**Mr. Justice Muhammad Imman Ali**  
**Mr. Justice Md. Shamsul Huda**

CIVIL APPEAL NO.29 of 2006

(From the judgment and order dated 03.12.2003 passed by the High Court Division in First Appeal No.235 of 1990.)

**Uttara Bank Limited** .....Appellant

=Versus=

**Credit and Commerce Insurance**  
**(Saudi) Limited and others** .....Respondents

For the Appellant : Mr. N. I. Bhuiyan, Advocate-on-Record.

For the Respondents : Mr. Syed Shaheed Hossain, Advocate instructed by Mr. Md. Nawab Ali, Advocate-on-Record.

Date of hearing : 11.07.2012.

**New defence plea at appellate stage:**

**Before this Appellate Division the defendant-appellant did not raise any question as to the correctness of the above concurrent findings of the courts of facts, rather it has raised a new plea to the effect that the plaintiffs could not prove that the defendant bank sold the said 152 travellers' cheques. But we are unable to accept this new defence plea at this stage specially in view of the pleadings of the contesting parties and the evidence adduced by them. ... (Para 10)**

**J U D G M E N T**

**Nazmun Ara Sultana, J.-**

1. This appeal by leave, at the instance of the defendant Uttara Bank Limited, is directed against the judgment and order dated 03.12.2003 passed by the High Court Division in First Appeal No.235 of 1990 affirming the judgment and decree passed in Money Suit No.1 of 1989 of the 2<sup>nd</sup> Commercial Court, Dhaka.

2. The above mentioned Money Suit No.1 of 1989 was filed by the plaintiff-respondents against this defendant-appellant stating, inter-alia, that in the back ground of an agreement dated 27.12.1982 between the plaintiffs and the defendant Uttara Bank Limited the defendant Uttara Bank Limited was to act as an agent and trustee of Bank of Credit and Commerce International (Overseas) Limited

(shortly BCCI)- the plaintiff No.2- for sale of BCCI Travellers' cheques on 14 different terms contained in the letter dated 27.12.1982 (Ext.2). The plaintiff No.1 was the insurer in the transaction to secure the loss of plaintiff No.2. That on 02.04.1984 the defendant bank's manager Abdus Satter requested to hand over 200 cheques of US\$ 500 each to it and BCCI Bank in due course of its business supplied those to Uttara Bank's authorized cashier Mr. Asgar Ali. Mr. Asgar Ali acknowledged the receipt of 200 travellers' cheques by signing a trust receipt dated 05.04.1984 (ext.4) as per agreement. Out of 200 those travellers' cheques Uttara Bank sold 152 cheques to various purchasers and the First National Bank Louisville Kentucky on behalf of BCCI Bank paid US\$76000 against those 152 travellers' cheques to the purchasers in between 30.04.1984 to 21.06.1984. Out of that US\$76000 BCCI received payment of US\$2000 only vide draft No.003569 dated 31.05.1984. The balance US\$74000 not being adjusted BCCI, London by its telex dated 27.09.1984 (Ext.11) addressed to Uttara Bank requested for payment giving detail particulars of travellers' cheques valued US\$74000 paid by its said banker to the various purchasers. That the remaining other 48 travellers' cheques were not sold by Uttara Bank and those were subsequently recovered from the drawer of Mr. Asgar Ali of Uttara Bank and were returned to BCCI. The defendant bank having not settled the claim, BCCI lodged claim and recovered the value from the insurer (plaintiff No.1) under a letter of subrogation and thereafter BCCI and the insurer jointly filed the suit against Uttara Bank.

3. The defendant Uttara Bank Limited contested the suit by filing written statement denying the material averments made in the plaint and contending, inter-alia, that the defendant bank never wrote to the plaintiff No.2 to supply travellers' cheques and did not authorize Mr. Asgar Ali to receive travellers' cheques on behalf of the defendant, that the requisition letter was not sent by any of the officers of the defendant bank and that the signatures appearing in the requisition letter were not the signature of any of the officers of the defendant bank and this alleged requisition letter was not genuine one and that if any travellers' cheque was received by Asgar Ali that was received by him in his personal capacity for which the defendant bank was not liable at all.

4. The trial court decreed the suit on the finding that the plaintiff was able to prove its case that Asgar Ali was authorized by the defendant bank to receive the travellers' cheques and as such the contention of the defendant bank that Asgar Ali acted beyond the course of his employment in the defendant bank or that the requisition letter was manufactured one was not acceptable. Against that judgment of the trial court the defendant preferred First Appeal No.235 of 1990 before the High Court Division and the High Court Division, after hearing both the parties, dismissed that appeal affirming the judgment and decree of the trial court concurring with the findings of the trial court that the defendant bank's manager Abdus Sattar wrote the requisition letter to the plaintiff bank to issue travellers' cheques of US\$1,00,000/- for counter sale and that the unsold travellers' cheques were found in the drawer of Asgar Ali who was in the employment of the defendant bank at the time when the travellers' cheques were supplied by the plaintiff bank, that from the evidence, both oral and documentary, it was clearly proved that Asgar Ali while in the employment of the defendant bank received travellers' cheques of US\$1,00,000/- and that the defendant did not pay the amount against 148 travellers' cheques.

5. Being aggrieved by the judgment and decree of the High Court Division the defendant-appellant filed Civil Petition for leave to appeal No.677 of 2004 on the main ground that the plaintiff-respondents failed to prove that the travellers' cheques were ever encashed or sold by the Uttara Bank and as such it cannot claim sale proceeds of those travellers' cheques from Uttara Bank.

6. Leave was granted to consider the submissions of the learned Counsel for the leave petitioner which have been stated in the leave granting order as follows:-

"The learned Counsel for the petitioner submits that the High Court Division has committed error of law in not considering that admittedly the transaction between the petitioner and the respondent Nos.2 and 3 being a credit transaction to act as a seller and trustee of the travellers' cheques of the said respondents and to remit the sale proceeds to the said respondents the petitioner bank is not legally liable to compensate for those travellers' cheques which were never sold by the petitioner bank.

He further submits that the High Court Division has committed error of law in not considering that the respondents having failed to prove that the petitioner bank has sold the travellers' cheques in question, the said respondents cannot claim the sale proceeds of those cheques.

The learned Counsel for the petitioner lastly submits that the High Court Division has committed error of law in not considering that the respondents having failed to prove that the travellers' cheques in question were ever encashed, cannot claim proceeds of those cheques from the petitioner bank who acted as a seller and trustee of the traveller cheques."

7. Mr. N. I. Bhuiyan, the learned advocate-on-record for the appellant has mainly argued before us to the effect that in this case the plaintiff could not prove at all that the travellers' cheques were ever encashed or sold by Uttara Bank and in the circumstances the plaintiff cannot claim the sale proceeds of those travellers' cheques from the defendant bank. The learned advocate has argued that there is no evidence on record to prove that the defendant bank sold those travellers' cheques and in the circumstances the defendant is not legally liable to compensate for those travellers' cheques which were never sold by the defendant bank. The learned advocate has contended that the High Court Division as well as the trial court committed error of law in not considering that the plaintiff-respondents having failed to prove that the defendant-appellant bank sold the travellers' cheques in question they cannot claim the sale proceeds of those traveller chaques.

8. To controvert the above submission of the learned advocate for the appellant Mr. Syed Shaheed Hossain, the learned advocate for the respondents has pointed out that this plea that the plaintiff could not prove the sale of the traveller's cheques in question- was not raised or agitated at all by the defendant-appellant either before the trial court or before the High Court Division. The learned advocate has submitted that in those two courts of facts the defendant-appellant pleaded a case to the effect only that the defendant bank or any of its officers never asked the plaintiff bank to issue any travellers' cheques and that Asgar Ali- the cashier of the defendant bank might have received those travellers' cheques fraudulently in his personal capacity and that for this personal and fraudulent act of Asgar Ali the defendant bank cannot be made responsible for payment for those travellers' cheques. The learned advocate has pointed out also that both the courts below, on proper consideration of evidence and other materials on record, disbelieved this case of the defendant and accepted the case of the plaintiff that being authorized by the manager of the defendant bank, namely, Abdus Sattar and on the requisition of the said manager Abdus Sattar the cashier Asgar Ali received 200 travellers' cheques from the plaintiff bank. The learned advocate for the respondents has contended that being defeated in both the courts below the defendant has now made an altogether new case which cannot be considered at all. The learned advocate has submitted further that the plaintiff-respondents stated categorically in their very pleadings that its banker The First National Bank Louisville Kentucky paid the value of 152 travellers' cheques out of which only US\$2000 was reimbursed and the balance was not reimbursed and that in support of this statement the plaintiff's witness P.W.1 gave oral evidence and produced Ext-11 giving particulars of payment against the balance travellers' cheques issued by the defendant bank. The learned counsel has pointed out that against these pleadings and evidence of the plaintiffs the defendant did not raise any question either in the trial court or in the appellate court and has argued that in this circumstance the above pleadings and evidence of the plaintiffs are sufficient to prove that those 152 travellers' cheques were sold. The learned advocate for the respondents has prayed for dismissal of this appeal.

9. We have considered the submissions of the learned Advocates of both the sides and gone through the judgment of the courts below and the evidence on record.

10. It appears that before the trial court and also the appellate court this defendant-appellant denied the claim of the plaintiff by pleading a case to the effect only that in fact the defendant bank or any of its officers never asked the plaintiff bank for issuance of any travellers' cheques or never sent any requisition for those travellers' cheques by Asgar Ali, the cashier of the defendant bank and that Asgar Ali might have fraudulently received those travellers' cheques from the plaintiff bank in his own capacity and not in course of his employment in defendant bank and as such the defendant bank was not responsible for payment of the sale proceeds of those travellers' cheques. But it appears that

both the courts of facts, on meticulous examination of the evidence adduced by both the parties and the facts and circumstances, arrived at the concurrent finding that Abdus Sattar- the manager of the defendant bank sent the requisition (Ext.-3) to the plaintiff bank for issuance of 200 travellers' cheques and also authorised Asgar Ali the cashier of the defendant bank to receive those travellers' cheques and accordingly Asgar Ali received those 200 travellers' cheques from the plaintiff bank. Before this Appellate Division the defendant-appellant did not raise any question as to the correctness of the above concurrent findings of the courts of facts, rather it has raised a new plea to the effect that the plaintiffs could not prove that the defendant bank sold the said 152 travellers' cheques. But we are unable to accept this new defence plea at this stage specially in view of the pleadings of the contesting parties and the evidence adduced by them.

11. It appears that the plaintiffs, in their very plaint, have categorically stated that its banker The First National Bank Louisville Kentucky paid the value of 152 travellers' cheques in between 30.04.1984 to 21.06.1984 to various purchasers and in support of this statement of the plaint the plaintiff produced exhibit-11- showing particulars of payment against those travellers' cheques. The exhibit-11 is the Telex dated 27.09.1984 of the BCCI, London, TC Division to Uttara Bank, Dhaka stating in details that The First National Bank Louisville, Kentucky paid total US\$ 77500 against 183 travellers' cheques including 148 travellers' cheques of the disputed transaction. The defendant bank did not try even to controvert the above pleading of the plaintiffs and this exhibit-11 produced by the plaintiffs either before the trial court or before the High Court Division. No suggestion even was ever made to any of the P.Ws. to the effect that the plaintiffs did not pay against those travellers' cheques or the purchasers did not encash those. The defendant could not return those travellers' cheques or did not make any statement to the effect that they would return those travelles' cheques to the plaintiff bank. So, in these circumstances we are unable to accept this new defence plea that the plaintiff could not prove the sale of those travellers' cheques by the defendant bank.

12. Considering the above facts and circumstances we find no merit in this appeal and hence this appeal is dismissed without any order as to costs.