LAW *opinion*

Israel-above the law!

DR. CHANDRA MUZAFFAR

THE failure of the United Nations to send a fact-finding mission to Jenin proves yet again that Israel is above the law. The international community has no right to scrutinise her behaviour. Israel can do what she wants and the world will just have to accept her arrogant defiance of public opinion.

The UN Security Council voted unanimously to establish a 20 member team under former Finnish President, Matti Ahtisaari, to ' uncover the facts of the Israeli army's assault on the Jenin refugee camp 'in Palestine in the middle of April. In fact, the mission was already a concession to Israel and the United States since a number of countries had initially proposed a comprehensive, independent inquiry into what they termed a massacre of innocent people. Aid agencies and Western Non Governmental Organisations(NGOs) had also submitted reports expressing their horror at the death, destruction and devastation wrought by the massive Israeli assault.

The UN Secretary-General, Kofi Annan, acting on behalf of the Security Council made a couple of other concessions to the Israeli government pertaining to the composition of the investigating team and its work procedures but they were not enough to satisfy Tel Aviv which continued to make fresh demands. Tel Aviv for instance insisted that it should have the right to decide who should be called as a witness and what documents should be presented to the panel. It also sought a guarantee from the panel that Israeli soldiers would be protected from prosecution. If the UN had agreed to the demands it would have reduced the investigation to an utter farce. Since the UN Secretary-General does not have the authority to force Israel to accept a fact-finding mission on his own terms, he had no choice but to disband the team.

By placing insurmountable obstacles in the path of the now aborted UN investigation, Israel has created the impression that it has a lot to hide in the Jenin affair. It has lent credence to the view that what took place in that refugee camp was nothing short of a dastardly slaughter in which perhaps a few hundred people died. Israel wants to bury the truth forever - as it tried in vain to obliterate the truth about Dier Yassin and other ignominious deeds in the past.

While most governments may acquiesce with Tel Aviv's vile plot, there is no reason why civil society groups should not establish their own independent inquiry into the Jenin massacre. They could collectively set up an international panel comprising respected personalities with integrity who are knowledgeable about the Palestinian situation to ascertain the entire truth about Jenin and to make that truth known to the world. Professor Emeritus Richard Falk, one of the world's leading authorities in International Law, would be a suitable candidate to head the inquiry.

In this regard, it is important to remind ourselves that civil society has adopted a much more principled position on the injustices committed by the Israeli regime against the people of Palestine than most governments. It was civil society which condemned Israel as an 'apartheid state' for its discrimination and subjugation of the Palestinians at the Durban Conference on Racism in early September 2001.

In fact, at Durban, both Israel and its patron, the United States, were totally isolated.

This is why the Israeli regime would do well to remember that when a state regards itself as above the law, as an actor that cannot touched by international norms, it becomes 'untouchable'. In other words, it becomes a pariah within the civilised world.

PHOTO: AFP

Palestinian policemen inspect a police station attacked by an Israeli Apache combat helicopter in the West Bank town of Ramallah. Palestinian leader Yasser Arafat was in his West Bank offices when the police building, only a few meters (yards) from the complex housing Arafats' office, was hit by three missiles.

Dr. Chandra Muzaffar is President, International Movement for a Just World (JUST)

LAW *watch*

The worst places to grow up

LIFE is a risky business for many children all over the world. And in some countries you have a much greater chance of being a happy, healthy, safe and well-educated child than in others. UNICEF has developed the "child risk measure" (CRM) which looks at children's welfare between birth and 18 in every country throughout the world. The formula for calculating the CRM includes the mortality rate for under-fives; the percentage of children moderately or severely underweight; the percentage of primary school age children not in school; levels of conflict; and HIV/AIDS prevalence rates for 15 to 49-year-olds.

Below we list the worst 20 countries in the world to grow up in, according to these calculations. Some continents fare much worse than others for instance, most of these countries are in sub-Saharan Africa, whereas children in European countries - even after periods of war, such as in Yugoslavia - usually do far better.

But whatever the state of their countries as a whole, there are children growing up in every nation, from Georgia to India, England to Peru, who will suffer the effects of poverty and powerlessness. Some of them tell us why.

Sagrario Suazo, 17, Honduras

"At the heart of the problem is poverty, which affects 600m children all over the world."

Mustajab, 17, Afghanistan/UK

Born in northern Afghanistan, Mustajab was imprisoned and tortured for five months. After his release, he finally reached Pakistan, and then sought asylum in the UK. "We had rocket attacks and bombs in our village every day. But we were used to it. Food was a big problem. We were surrounded by the Taliban, and traders were not allowed to bring food. People only had wheat and corn, but they couldn't sell it to buy salt or oil because they wouldn't have enough to eat."

Reema, 11, Bangladesh

Reema lives on the streets; she makes a living collecting rags and selling chocolate. "There are many people on the street who do bad things to children and even if children go to the police, they don't get justice. Children who are 'floating' are helpless. Adults should not do anything to hurt us. Your responsibility is to help us."

Peer educators, 12-17, Cambodia

"If you stay in school you're more likely to know about HIV and how to avoid it."

Abilio, 6, Angola

Although only six, Abilio has already had to flee his home village twice to escape war. He currently attends a Save the Children emergency feeding centre for malnourished children.

"Our first few weeks in Huambo we were all so hungry. The hunger was so bad that we regretted coming here. Some days we ate nothing at all. I don't know what this place is for, but I'm not so hungry any more."

Abaynesh Yesuge, 12, Ethiopia

"The water was very bad, because people and many animals like dogs and donkeys used to drink here. It was dirty and smelly. We used to stay for a long time to collect the water - maybe an hour. It also tasted bad."

Then Save the Children constructed a protected spring in her village. "Now things are much better. When we come to collect the water, we can take it home immediately. Now everything is clean and comfortable and fast."

The twenty worst places to be a child

Angola is the worst place in the world to be a child. Thirty years of conflict and civiil war have meant the collapse of the health and education systems and widespread food shortages. Many people have been forced to leave their homes to live in makeshift camps, where disease is rife. There is progress though: despite a polio epidemic in 1999, a massive campaign to immunise all children in Angola aims to wipe out the disease once and for all.

1 Angola, 2 Sierra Leone, 3 Afghanistan, 4 Somalia, 5 Ethiopia, 6 Guinea-Bissau, 7 Niger, 8 DR Congo, 9 Burundi, 10 Eritrea, 11 Liberia, 12 Rwanda, 13 Guinea, 14 Chad, 15 Mali, 16 Mozambique, 17 Central African Republic, 18 Burkina Faso, 19 Cambodia, 20 Sudan

Courtesy: The Guardian

Star LAW *report*

Bouncing a cheque may make a customer land on far-reaching eventualities

High Court Division, The Supreme Court of Bangladesh
Islami Bank and others .... appellants
-Vs-
Dewan Md. Yusuf ...respondent
Before Mr. Justice Md. Tafazzul Islam and
Mr. Justice AHM Shamsuddin Chowdhury
Appeal from Original Decree No. 251 of 1999.
Judgement: January 16, 2002.

AHM Shamsuddin Chowdhury J

THIS appeal is directed against the original judgement and the decree dated 28.2.99 passed by the learned Subordinate Judge and Commercial Court No. 1, Dhaka, in Money Suit No. 3 of 1995. By his judgement, the learned judge granted the relief the plaintiff asked for by way of monitory compensation to the tune of Tk. 3,52,000/-(Three lac fifty-two thousand) only.

Facts

One Dewan Md. Yusuf, as the plaintiff, filed the aforementioned suit by impleading Islami Bank Ltd, a Dhaka based schedule bank, registered with the Registrar of Joint Stock Companies under the provisions of the Companies Legislation, Senior Vice President of the said bank, as well as the said bank represented by it's President, as defendants no. 1, 2 and 3 respectively. The salient facts as narrated in the plaint in this case are, in nutshell, narrated below:

The plaintiff, who accumulated some money by dint of his hard labour in South Korea, subsequently returned to Bangladesh with those money. On 20.2.95, he opened a current account in his own name at the Local Branch of the defendant no. 1 bank. The plaintiff deposited a total of Tk. 3,97,000/- by making two deposits, on 22.2.95. He was given a cheque book containing 25 pages bearing no. 1130301 to 1130325. On 22.2.95 the plaintiff drew a cheque in favour of one Nazrul Islam for Tk. 820/- on page no. 1130301 of the cheque book, who did, however, instead of encasing the cheque, return the same to the plaintiff. On 22.3.95 the plaintiff handed over a cheque, drawn on page no. 1130303, for Tk. 3,95,000/-, to his mother, Mrs. Khorshad Aktar Gani. But the cheque was dishonoured by the defendant no. 1 bank, with a memo stating "not arranged for", and returned on 23.3.1995. On receiving the news of the said bouncing, the plaintiff approached the defendant no. 2 and asked for the reasons, but the said defendant was unable to give a worthwhile explanation. A couple of correspondences, including legal notices, and replies, were exchanged between the parties afterwards, whereby the plaintiff claimed, and the defendants refused, to pay the sum in question. In the face of the defendants persistent refusal to adhere to the plaintiffs request, he being left with no alternative, filed the present suit.

The suit was contested rather vigorously and all of the three defendants filed their written statement jointly denying their liability. The plaintiff's claim as to the opening of the account in the defendant no. 1 bank, deposition of the said claimed amount of money had all been admitted in the written statement. The defendants however, in substantiating their stand to ward off liability, stated that on receipt of the cheque for Tk. 150,000/- bearing number 1130301, the bank conducted necessary examination through the computer, compared the signature on the cheque with the specimen signature of the plaintiff as kept in the bank, and having detected no discrepancy, the bearer was paid the said amount. The written statement went on stating that on 14.3.95 the plaintiff issued another cheque bearing no.1130303 for Tk. 2,00,000/-. After similar examination and satisfaction, the said amount of money was handed over to the bearer in the same way, and hence when the cheque no. 1130303 for Tk. 350,000.00, issued to Mrs. Khorseda Akhater Gani arrived, the defendants had to bounce the same as the computer revealed that the plaintiffs' account did not have sufficient fund to honour the same. The said two cheques. bore on appearance of forgery, in any way. The money was paid against those two cheques with complete honesty and diligence without any negligence. They had taken all necessary steps to bring the matter to the knowledge of the law-enforcing authority without wastage of time. The bank followed provisions of the Negotiable Instruments Act 1881 when it paid the money, contending that the bank incurs no liability for any loss sustained by any customer if the provisions of the said Act are complied with.

During the trial of the case, the plaintiff in his capacity as the PWI reproduced the story as were contained in his plaint and also stated that the money he deposited in the bank had to be earned in a very hard way.

The Deliberations

The learned judge below after hearing submission and analysing the evidences decreed the case in favour of the plaintiff, with cost and interest @7% Before us Mr. Abdur Razzaq, appearing for the defendants/appellants, with his traditional eloquence, submitted that the banks' liability is never absolute. As long as the bank follows the principle of "due diligence" and resorts to the required degree of prudence, they are, in the prevailing state of the law, under no obligation whatsoever, to account for any loss that may be incurred by a customer in the plaintiff's position. To substantiate the claim that the bank has taken necessary precaution, and followed the required rules, and the expected standard of care, Mr. Razzaq submitted that the differences in signatures were too obscure to be detected by naked eyes. On the admitted difference as to the sizes as well as the colour of the two sets of cheques, his contention was that the variances were so minute that it was impossible to trace the differences without scientific aid. He submitted that the bank took recourse to every cannon of care in disbursing the money as are done in the normal course of banking transaction. He further submitted that the circumstances of the case indicate that the plaintiff himself had played some reproachable part in the whole episode.

Mr. Syed AB Mahmudul Huq, the learned advocate for the plaintiff/respondent, on the other hand, contending that the banks liability are generally absolute, and that the defences available to a bank are out of context in the factual scenario of this case, submitted that, had the differences in the signatures, in the colours and sizes of the cheques, not immediately detectable, DW1, would not be able to identify the said differences so instantaneously with his bare vision. He also submitted that the banks bear a particularly distinctive responsibility as the custodian of their customers money. This duty, said Mr. Huq, require the banks to be on their guard in honouring cheques, submitting further that in the instant cases even a minimum degree of care was not taken, as otherwise the forgery would have been revealed without much ado. Mr. Huq further pointed out that the number on two sets of cheques is conspicuously different in that there is an additional letter "A" on the forged cheques.

During the proceedings before us, we had an opportunity to examine the cheques in question ourselves and we encountered no difficulty whatsoever to identify the differences without any help of any apparatus. We also noted that a minute, but not invisible, difference also existed in the colour of the two sets of cheques. The additional letter "A," as pointed out by Mr. Huq, should raise suspicion in the mind of any careful personnel involved in banking sector.

International precedents

Mr. Razzaq's submission on law point required us to travel deep into the field of the veritable mine of authority on that point. A long line of stable, uninterrupted and profundity of authority, unequivocally proclaim that the obligation of the bank, so far as those cheques are concerned, which do not carry the customers signature at all, the liability is nothing but absolute, subject only to the defences of estoppel, adoption or ratification. The obstinacy of the legal position in this respect can be succinctly portrayed by reproducing some passages from the Privy Councils decision in the case of Tai Hing Cotton Mills Ltd. v-Liuchong Bank Ltd (1985 2 All. E. R. 947), in which case the Judicial Committee of the Privy Council, basing their decision on the fundamental premises that a cheque without customer's signatory is not the customer's cheque at all, made the following observation, which observation was cited with approval by the Supreme Court of India in the case of Canara Bank-v-Canara Sales Corporation and others (AIR. 1987 SC. 1603); "But it does not follow that because they may need protection as their business expands, the necessary incidents of their relationship with their customer must also change. The business of banking is not the business of the customer but of the bank. They offer services, which is to honour their customers cheque when drawn on an account in credit or within an agreed overdraft limit. If they pay out on cheques, which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service, which it is their business to offer. The limits set out to the risk in Macmillan and Greenwood cases can be seen to be plainly necessary incidents of the relationship. Offered such a service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating the account." The quoted observations make it clear that if a bank pays on a cheque which does not contain the customer's signature, the earlier acts without mandate and can not repel liability, the only limitation on bank's liability being based on customer's lack of care in drawing a cheque as well as on his deliberate abstention from informing the bank of forgery, as happened in London Joint Stock Bank-v-Macmillan (1918 AC. 777), as well as in Greenwood-v-Martins Bank Ltd (1933 AC, 51) respectively.

In spelling out the limitation on bankers liability, no lesser a personality than that of Lord Scarman, in Tai Hing Cotton Mills case, with whom other Right Honourable Members concurred, in delivering the advice for the Board, expressed the view that in the absence of express agreement to the contrary, the duty of care owed by a customer to his bank in the operation of his current account was limited to a duty to refrain from drawing a cheque in such a manner as to facilitate fraud or forgery and a duty to inform the bank of any unauthorized cheques purportedly drawn on the account as soon as the customer became aware of it, and that the customer was under no duty to take reasonable pre-cautions in the management of his business with the bank to prevent forged cheques being presented for payment, nor was he under a duty to check his periodical bank statements so as to enable him to notify the bank of any unauthorized debited items, because such wider duties were not necessary incidents of the banker-customer relationship since business of banking is not the business of the customer but that of the bank. His Lordship also expressed that since there was no duty on the part of the customer to disclose or act, no question of estoppel arising from mere silence, omission or failure to act could arise. His Lordship stated "The customer's duty in relation to forged cheque is therefore two fold he was must exercise due care in drawing his cheque so as not to facilitate fraud or forgery and inform his bank at once of any unauthorized cheques of which he become aware." In this, i.e. Tai Hing Cotton Mills case, where the appellant customer's accountant, having been vested with the custody of the cheque books, forged his master's signature and drew money to the tune of 5.5 millions Hong Kong, Dollars, the Privy Council advised Her Majesty to allow the appeal.

In N Joachimson-v-Swiss Bank Corporation (1921 3 KB 110), Atkin LJ. Stated." The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery." Limited nature of duty on customers part was also emphasized in the oft quoted case of London Joint Stock Bank Ltd-v-Macmillan (Supra); in Greenwood-v-Martins Bank Ltd. (Supra), and, in the olden days, in case of Yong-v-Grote (1827, 130 ER. 764) in which cases, plea for imposition of wider duty were rejected.

In the widely quoted, and visibly immortal, decision of the House of Lords in the case of London Joint Stock Bank Ltd-v-Macmillan (Supra), which decision received express approval from, and was followed by the courts in this sub-continent before and after the partition in 1947, the Lord High Chancellor, while elaborating the customer's liability under negligence, nonetheless, made it profusely clear, in no utopian language, that to make the customer liable. "The negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn," stating further, "It would be no defence to the banker, if the forgery had been that of a clerk of a customer."

The Supreme Court of India in Canara Bank-v-Canara Sales Corporation and others (AIR. 1987 SC. 1603) approving of the ratio in Tai Hing Cotton Mills Ltd case in toto, and echoing the "mandate" theory, stated that whenever a cheque purporting to be by a customer is presented before a bank, it carries a mandate to the bank to pay and, if the signature on a cheque is a forged one. It is not the customers signature and hence, that cheque carries no such mandate, and as such, the bank can, in such a case escape liability only if it can establish knowledge of the customer about the forgery in the cheque, and that, inaction for continuously long period, cannot by itself, afford a satisfactory ground for the bank to escape liability. The Supreme Court of India further stated that unless the bank is able to satisfy the court of either an express condition in the contract with it's customer or an unequivocal ratification, it will not be possible to save the bank from liability.

A bank's relationship with a customer, who deposits money, is essentially a contractual one. A bank is neither a bailey, nor a trustee of the customer's money, but as the House of Lords described in Foley-v-Hill (1884 2 HL Case 28 and the Court of Appeal stated in Joachimson-v-Swiss Bank Corp (Supra), is simply a debtor to his customer and remains bound to repay the debt in accordance with the terms of the contract.

The authorities discussed above, however, speak of the bankers defence of estoppel, adoption and ratification in respect to cheques having no signature of the customer. Adoption and ratification being out of context in the present case, only estoppel may deserve some discussion. Lord Tamalin's analysis on the plea of estoppel, as he narrated in the famous classic case of Greenwood-v-Martins Bank Ltd (Supra), in which case husband's deliberate abstention from informing the bank about the forgery perpetrated by his wife, until after she committed suicide, was held to have had given rise to estoppel, because the bank could have sued the wife to recover the money, if they were informed of the forgery before she killed herself, can be succinctly portrayed by stating that to succeed in the plea of estoppel, the bank has to prove that the customer made a representation or demonstrated a conduct amounting to representation, which induced a course of conduct on the part of the bank to whom the representation was made and, that an act or omission resulted formed the said representation, by the person to whom the representation was made to their detriment. This reflects the same principle as are applicable to the doctrine of "estoppel", generally.

As per the decision in London Intercontinental Trust Ltd-v-Barclays Bank Ltd. (1980 1 Llayds Rep 241), if the signatory is regularly allowed by this principal or employer to draw cheques in a manner or for a purpose that would ordinarily be regarded as unusual or unauthorised, the customer may be estoppel from disputing his authority. Save, those discussed above; a bank has no other defence in respect to a cheque that does not bear customer's actual signature. The Supreme Court of India in New Marine Coal Company Private Ltd-v-The Union of India (AIR1966, SC.152), stated that whenever a plea of estoppel is raised on the ground of negligence, negligence to which a reference is made in support of such a plea, is not negligence as is understood in popular language or in common sense; it has a technical denotation and that in support of a plea of negligence it must be shown that the party against whom the plea is raised, owed a duty to the party who raises the plea. The Supreme Court continued to state "just as estoppel can be pleaded on the ground of misrepresentation or act or omission, so can estoppel be pleaded on the grounds of negligence, but before such a plea can succeed negligence must be established in this technical sense." Their Lordships added that before a plea of estoppel on the ground of negligence can be upheld, in any event, the negligence must not be indirectly or remotely connected with the misleading effect assigned to it, but must be proximate to the real cause of that result. What is clear from the decisions in New Marine Coal Co. Ltd. Case is that to invoke the plea of negligence, it must be a negligence in the sense enunciated by Lord Atkin in the doctrinal case of Donoghue-v-Stevenson (1932 AC.562) and that even when negligence in Donoghue sense is established, it must then be proved that negligence took place during the process of the transaction and was the "Causa proxima" of the payment made by the bank.

Having analysed the above discussed legal position as enunciated by preponderance of authorities, we are unable to be swayed by Mr Razzaq's submission, rhetoric though it was, that the banks responsibility goes no further than adhering to the general duty of care in comparing the signatures in the normal way and that the bank incurs no liability if it pays on a cheque in "due course," for the authorities discuss above are consensual and overriding on the proposition that if the cheque does not bear the customer's signature, the liability, subject to the defence of estoppel, ratification and adoption, none of which falls within the context of the factual state of the present case, the bank's obligation is rather an absolute one. The protection as afforded by Section 85 of the Negotiable Instruments Act, 1881, in respect of payment made in "due course" as defined by Section 10 of the said Act, is relevant only in Macmillan type situation, namely, where undetectable material alternation is caused to a cheque which does, nevertheless, contain customer's real signature.

Mr Razzaq, when he argued that bank's liability is not absolute, possibly had Sections 10, 85, 87, 88 and 89 of the Negotiable Instruments Act 1881, and the principle of payment "in the course" as is contemplated by section 85 of the said Act, in mind. But a cheque form, which, when drawn, is a bill of exchange, can not attract Section 5 of the Negotiable Instruments Act, as it pre-requires such a cheque to be "signed by the customer." This follows that none of the provisions of the said Act can be canvassed in aid by the bankers in respect to a cheque which does not satisfy Section 5 as stated above. Provisions of the said Act can be availed only in a situation like that of Macmillan case, such as, where the amount in the cheque from, which contains customer's actual signature, is enhanced by forgery. But that is not the case before us.

As to Mr Razzaq's submission that the plaintiff himself was a functionary in the process of forgery, we have to say that there is nothing in the evidence to back up the accusation that the plaintiff was instrumental to such a horrendous mischief. Mr Razzak may be right, he may not be. None can dwell on speculation in the absence of concrete evidence. Not only that the burden of proving alleged fraud and deceit falls squarely and vertically one the bank, because of the rule "Probandi necessits incumbit illi qui agit," but also, as the House of Lords unequivocally ordained in the widely acclaimed case of R-V-Secretary of State for Home Department ex-prate Khawja and Khera, 1984, AC. 74, that although all question in a civil case are to be determined on preponderance of probability, an allegation of criminal nature in a civil case is to be proved with a higher degree of probability.

Before parting, it would be prudent to express that bouncing a cheque with an endorsement, similar to one made in this case, may make a customer land on far-reaching eventualities, like facing prosecution under Section 138, of the Negotiable Instruments Act, as amended, or even under Section 420 of the Penal Code, and, in any event, may tarnish his image, and hence, as was held in Rook-v-Fairrie (1941 KB 507), the bank's liability may extend to one under the tortious law of defamation, subjecting it to pay substantial damages.

Apart from the legal aspect discussed above, we must also make it clear that the fate of this appeal would not have been any different even if the legal position were otherwise, for the weight of evidence is overwhelming to dispel the contention that the bank officials resorted to practicable degree of diligence and that the forgery was not detectable without the aid of scientific device.

Decision

Having perused the papers and the evidence and analysed the legal position as above, we are in no hesitancy to hold that nothing would justify our interference to disturb the judgement and the decree passed by the learned Court below. In view of above the appeal is dismissed without any order as to cost.

Md Tafazzul Islam J: I agree

Mr. Abdur Razzaq with Mr. Shafiul Alam Mahmood ... for the appellant; Mr. Syed AB Mahmudul Huq with Mr. Syed Mahmudul Ahsan ... for the respondent.

LAWSCAPE