

UNREPORTED

IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) No.1694/2001

AMERICAN EXPRESS TRAVEL
! RELATED SERVICES CO. INC. Plaintiff
through: Mr.Jayant Tripathi, Advocate

VERSUS

\$ M/S. SYNERGY FINANCIAL EXCHANGE LTD. Defendant
^ through: Ex-parte

RESERVED ON: August 12, 2008
% DATE OF DECISION: November 17, 2008

CORAM:

* HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **REVA KHETRAPAL, J.**

1. The plaintiff through this suit seeks a money decree in the sum of US Dollar 3,03,831.33, equivalent to Indian Rupees 1,44,47,179/- in its favour and against the defendant along with pendente lite and future interest @ 18% p.a. with a direction to the defendant to pay the decretal amount in US Dollars or alternatively in Indian Rupees with requisite permission from the Reserve

Bank of India to remit payment in equivalent Indian currency.

2. The facts succinctly stated are as follows. The plaintiff, M/s. American Express Travel Related Services Co. Inc is a Corporation organized and existing under the laws of the State of New York, United States of America with its Principal Office at American Express Tower, World Financial Centre, New York-10285, USA. The plaintiff corporation is engaged, inter alia, in the business of issuing Travellers Cheques (TCs) of different foreign currencies, comprising as US Dollars, Canadian Dollars, German Mark, Japanese Yen, Dutch Guilder, Australian Dollar, French Francs, British Pound Sterling and Swiss Francs.

3. The present suit is instituted by the plaintiff through Mr.Dara Phirozeshaw Mehta, the duly constituted power of attorney holder, authorized to institute, sign and verify the plaint and to prosecute it at all stages. A copy of his power of attorney has been exhibited as Exhibit PW-1/1.

4. The defendant is stated to be engaged, inter alia, in the business of Money Changing and is a licensed full fledged money changer. The defendant approached the plaintiff, requesting the plaintiff to appoint the defendant as trustee and agent for selling Travellers Cheques (TCs) . Acceding to such request of the defendant, the plaintiff appointed the defendant as its trustee to deal in the Travellers Cheques issued by the plaintiff, for which the defendant on 05.11.1993 executed an agreement called Trust Agreement -Full Liability

(hereinafter called the 'Agreement') along with other ancillary documents, including Indemnity and Guarantee. The terms and conditions of the said Agreement (Exhibited PW-1/4) were to govern transactions between the plaintiff and the defendant and the same constituted a written contract between the parties.

5. In terms of the aforesaid Agreement, the defendant had agreed to receive and hold in trust the Travellers Cheques for the plaintiff and to return the unsold Travellers Cheques to the plaintiff. In terms clauses 2(c) to (e) of the said Agreement, the defendant was also required to collect the sale proceeds of the Travellers Cheques and to remit the same to the plaintiff and to hold the sale proceeds in trust for the plaintiff till remission upon demand at any time by the plaintiff.

6. The relevant clauses of the said agreement are as under:-

“2. Seller accepts appointment as such trustee and agent and agrees (a) to receive, and hold IN TRUST for issuer, Travellers Cheques delivered to Seller; (b) to sell and issue such Travellers Cheques only in accordance with written instructions from Issuer; (c) to collect such charges for the sale of Travellers Cheques as may be established by Issuer from time to time; (d) to hold for the account of and IN TRUST for issuer, and entirely separate and apart from other funds, all money received by Seller upon the sale of Travellers Cheques (hereinafter called Proceeds of Sale); (e) to remit to Issuer, in accordance with written instructions of Issuer or at any time on demand, all Proceeds of Sale, less such portion of the charges collected as Issuer shall from time to time specify may be retained by Seller and (f) to deliver to Issuer on demand any unsold Travellers Cheques.

3. Issuer may deliver Travellers Cheques to any employee or representative of Seller and all such employees and representatives are hereby authorized to accept such Travellers Cheques on behalf of Seller. Promptly after receipt of each delivery of Travellers Cheques, Seller agrees to return to Issuer at the office from which such delivery was sent, one copy of the Trust Receipt enclosed with such delivery, signed by or on behalf of Seller. Seller shall safeguard Travellers Cheques and the Proceeds of Sale as a prudent man would safeguard a like amount of his own cash.

4. In case of loss of any Proceeds of Sale or Travellers Cheques, whether by theft, burglary, holdup, fire, dishonesty of employees, mysterious disappearance, or any other cause, Seller shall notify Issuer immediately at the office from which Travellers Cheques are sent to Seller, giving full particulars of the loss, including the serial numbers of Travellers Cheques lost and the circumstances of the loss. In the event of any such loss and irrespective of the cause thereof, Seller (a) shall pay Issuer forthwith the amount of Proceeds of Sale so lost and (b) shall pay Issuer from time to time upon demand the face amount of any Travellers Cheque so lost and which has been presented to and paid by Issuer without reference to the legal obligation of Issuer to make such payment.

5. Seller agrees that any cheque, draft or like order accepted by Seller in payment for Travellers Cheques sold by Seller, shall be at the sole risk of Seller and Seller shall be liable to Issuer for the face amount (plus Issuer's share of the charge) of Travellers Cheques thus sold irrespective of whether any such cheque, draft or order is paid upon presentment.

6. If Seller is two or more individuals or a partnership, each individual signing this agreement and each member of the partnership shall be jointly and severally liable to Issuer with respect to the obligations of Seller under this agreement.

7. This agreement (a) may not be assigned by Seller without the written consent of Issuer and (b) may be modified only by an agreement in writing signed on behalf of Issuer by a regional officer or official senior to him. No other employee of Issuer has

authority to modify or waive any term of the agreement. This agreement may be assigned by Issuer or to any parent, subsidiary, associate or affiliate and shall, whether or not so assigned, inure to the benefit of Issuer, parent, subsidiary, associate or affiliate thereof which pays or becomes liable upon any Travellers Cheque delivered to Seller under this agreement.

8. This agreement shall remain in force until terminated by either party by notice mailed or cabled to the other party addressed to it at the address set forth above, which notice, unless otherwise specified therein shall be effective immediately. Upon such termination, Seller shall forthwith remit to issuer all Proceeds of Sale, less its portion of the charges, **and destroy all unissued Travellers Cheques by cremating or shredding, said destruction to be evidenced by a Destruction Certificate. The Destruction Certificate shall be (i) on Seller's letterhead, (ii) executed by Seller through two authorized signatures, and (iii) shall particularly describe the Travellers Cheques by (a) serial number, (b) currency, (c) denomination, (d) quantity, and (e) value.** In addition, Seller shall return any equipment, display material or other property furnished to Seller by Issuer, all of which equipment, display material, etc. shall at all times remain the property of Issuer and may be removed by Issuer at any time without notice to Seller. All Proceeds of Sale and Travellers Cheques shall, until remitted to Issuer, continue to be held IN TRUST for Issuer

9. The rights of Issuer hereunder shall not be prejudiced or restricted by any time given or forbearance extended to Seller in the enforcement of its rights and no waiver by Issuer of its rights in respect of any breach hereof by Seller shall be deemed to operate as a waiver in respect of any subsequent breach hereof.

10. It is agreed between the parties that in the event of any provision of this Agreement being held to be invalid or unenforceable the remainder of this Agreement shall continue in full force and effect notwithstanding such invalidity or unenforceability and shall be binding and effective on the parties hereto.”

7. In accordance with the above Agreement, the defendant was issued

Travellers Cheques by the plaintiff in different tranches on different dates for which the defendant duly executed receipts. The available receipts have been placed on record as Exhibit PW-1/5 (collectively). The defendant thereafter neither returned the Travellers Cheques held by it in trust nor made the payment in lieu thereof. Accordingly, the plaintiff vide its letter dated 28.07.1998 (Exhibit PW-1/6) called upon the defendant to comply with the requirements of the Agreement between the parties, by remitting the amount on account of proceeds of sale of the Travellers Cheques. The amount payable by the defendant in respect of claims of all currencies was clearly enumerated in the Statement of Account annexed with the letter (Exhibit PW-1/7).

8. The defendant, however, failed and neglected to act in accordance with the Trust Agreement and neither returned the TCs held by it in trust nor made the payment in lieu thereof and thus committed breach of its contractual obligations.

9. When the defendant failed and neglected to respond to the letter dated 28.07.1998, the plaintiff realised that the defendant despite transferring the Travellers Cheques for valuable consideration, had no intention of remitting the payment to the plaintiff. It was also realised that the defendant had no intention of returning the unsold Travellers Cheques, which were retained by the defendant. Thereafter, the plaintiff made several requests to the defendant to rectify the situation and to do the needful. Since no response was

forthcoming, the plaintiff was eventually constrained to instruct its counsel to send a legal notice to the defendant (Exhibit PW-1/8), demanding from the defendant the amount so withheld by it with interest at the rate of 18% per annum and simultaneously terminated the Agreement in terms of the provisions contained in the Agreement. Proof of the despatch of the said notice has been placed on record by the plaintiff as Exhibit PW-1/9. No response having been received, the instant suit was filed for the recovery of the sum of Rs.1,44,47,179/- with interest thereon.

10. Summons in the suit were issued to the defendant time and again and ultimately, the defendant was got served by the plaintiff through publication for 7th March, 2006. However, despite service by way of publication, the defendant chose not to enter appearance and contest the suit. The plaintiff, in view of the provision of Order XXXVII accordingly became entitled to the decree prayed for. The fact that the suit was under Order XXXVII not having been brought to the notice of the Court, by an order dated 5th October, 2006, the defendant was proceeded ex parte. After the defendant was proceeded ex parte, the plaintiff led its ex parte evidence by filing the affidavit by way of evidence of PW1/A Mr.Abhay Pahuja, Manager (Consumer Risk Management) of the plaintiff company, which was tendered in evidence along with documents Ex.PW-1/1 to PW-1/9.

11. In the affidavit by way of evidence filed on behalf of the plaintiff, PW-1

Mr. Abhay Pahuja reiterated and re-affirmed all the averments made in the plaint. It was also submitted in the affidavit by the plaintiff that the failure on the part of the defendant company to comply with the time limit stipulated for the remittance of the proceeds of sale to the plaintiff constituted a breach of trust as well as breach of the terms of the written contract on its part, thereby rendering the defendant company liable to pay the entire amount due and outstanding in the running account maintained by the plaintiff with interest.

12. I have heard the learned counsel for the plaintiff. The case of the plaintiff is based upon a written agreement entered into between the parties on 5.11.1993. In terms of the said agreement, the defendant had agreed to receive and hold in trust Travellers Cheques and the sale proceeds thereof on behalf of the plaintiff, to return the unsold Travellers Cheques to the plaintiff and to hold the same in trust until returned. The defendant having breached its obligations under the agreement, the plaintiff must be held entitled to a decree in terms of the Statement of Account submitted by it (Exhibited PW-1/7).

13. In view of the aforesaid, a decree in the sum of US Dollar 3,03,831.33 equivalent to Indian Rupees 1,44,47,179/- is passed in favour of the plaintiff and against the defendant along with pendente lite and future interest @ 18% p.a. with a direction to the defendant to pay the decretal amount in US Dollars or alternatively in Indian Rupees with requisite permission from the Reserve Bank of India to remit payment to the plaintiff in equivalent Indian currency.

The plaintiff shall also be entitled to costs of the suit. The registry shall draw up the decree-sheet in the above terms forthwith.

14. CS(OS) No.1694/2001 stands disposed of accordingly.

November 17, 2008
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REVA KHETRAPAL, J.