

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No.789/2003**

% **30th January, 2012**

SH. ANIL MOTIHAR & ANR. Appellants
Through: Mr. Raman Kapoor, Sr.Adv. with
Mr. Dhiraj Sachdeva, Adv.

VERSUS

PUNJAB & SIND BANK & ORS. Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? Yes

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal filed under Section 96 of the Code of Civil Procedure, 1908 (CPC) is to the impugned judgment of the Trial Court dated 18.9.2003 decreeing the suit of the respondent no.1/plaintiff-bank for recovery of ₹4,94,308/- jointly and

severally against all the defendants in the suit. The defendants no. 1 and 2 are the appellants in this Court.

2. The facts of the case are that the defendants no. 1 and 2/appellants had a Letter of Credit (LC) in their favour from a German Bank, and on the representation that the LC would be paid on the due date, they applied for a packing credit limit with the respondent no.1/plaintiff-bank. The case of the respondent no.1/plaintiff-bank was that without actually obtaining sanction, the defendants no. 5 and 6, who were the employees of the respondent no.1/plaintiff-bank, in collusion with the defendants no. 1 to 4 got issued a manager's cheque dated 6.12.1985 for a sum of ₹3,00,000/-, and which manager's cheque was credited in the account of the defendants no.3 and 4. The defendant no.3 is the sole proprietary concern of the defendant no.4. The respondent no.1/plaintiff-bank alleged fraud and collusion, and, besides taking action under the criminal law, filed the subject suit for recovery based on Section 70 of the Indian Contract Act, 1872. Para 5 of the plaint showing benefit derived by the defendants no. 1 and 2/appellants for payment made by the respondent no.1/plaintiff-bank to the defendants no. 3 and 4 reads as under:-

“That as submitted above the Manager’s cheque was issued in favour of defendant No.3 the sole proprietorship firm of defendant No.4. Defendants No. 3 and 4 having taken the benefit of the said amount and having enriched themselves therewith and/or utilized the said amount are liable to repay the said amount with interest, more so when defendants No.1 and 2 now contend (which is denied) that they had not authorized the release of the said amount to defendants No. 3 & 4.”

(emphasis supplied).

3. The respondent no.1/plaintiff-bank therefore claimed a joint and several decree against the defendants no.1 and 2/appellants, on whose behalf benefit was received by defendants no. 3 and 4, and also the defendants no. 5 and 6, its employees with whose collusion the banker’s cheque was prepared.

4. The suit was contested by the appellants/defendants no.1 and 2 stating that there was no collusion between them and the officers of the respondent no.1/plaintiff-bank for drawing up of the banker’s cheque. It was pleaded that since the payment was made to the defendants no. 3 and 4 by the respondent no.1/plaintiff-bank without packing credit limit being sanctioned in favour of the appellants/defendants no. 1 and 2, the respondent no.1/plaintiff-bank acted illegally and therefore was not entitled to recover the suit amount from the defendant Nos. 1 and 2.

5. After the pleadings were completed, the Trial Court framed the following issues:-

- “1. Whether the present suit has been filed by duly authorized person? OPP
2. Whether the present suit has been filed within a period of limitation? OPP
3. Whether the plaintiff is entitled to a decree of ₹4,94,308.23p. against defendants alongwith pendente lite and future interest at the rate of 16.5% per annum? OPP
4. Whether the present suit is ad for misjoinder of parties against defendant No.6? OPD
5. Relief.”

6. Before I refer to the findings and conclusions of the Trial Court, in order to show that the plaintiff-bank/respondent no.1 satisfied the requirements of section 70 of the Indian Contract Act, 1872 by leading evidence, I would like to refer to para 10 of the affidavit by way of evidence filed on behalf of the respondent no.1/plaintiff-bank. This para 10 reads as under:-

“10. That the deponent state that the Plaintiff was deprived of the said sum of ₹3 lacs by the Defendants. The Plaintiff Bank carries on business of Banking. The amount released/advanced was not given intending to do so gratuitously. Admittedly, Defendant No.3 & 4 enjoyed the

benefit thereof. The plaintiff as such is entitled to the refund of the said amount with interest, at such rates as per the Plaintiff Bank charges from its customers with respect to the credit facilities.”

(emphasis supplied).

7. In addition to the above, it has also come out in the cross-examination of the defendants no. 1 and 2, defendant no.2 being the sole proprietor of the defendant no.1, that the defendants no. 1 and 2 knew the defendants no. 3 and 4. They had business dealings with the defendants no.3 and 4. Defendants no. 3 and 4 were, in fact, supplying fabric to the defendant no.1. The relevant portion showing the admissions of the defendants no. 1 and 2 in their cross-examination reads as under:-

“I knew the defendant No.3 and defendant No.4. I had business dealings with the defendants No.3 & 4. Defendants No. 3 & 4 were supplying fabric to my company i.e. defendant No.1(objected to).”

8. Section 70 of the Indian Contract Act, 1872 reads as under:-

“70. Obligation of person enjoying benefit of non-gratuitous act.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

Under Section 70 of the Indian Contract Act, 1872, either a person derives benefit directly by his receiving the thing or money or on behalf of such person some other person receives the benefits or monies. In the present case, there have been made the necessary averment in the plaint as per Section 70 of the Indian Contract Act, 1872. The affidavit by way of evidence filed by the respondent no.1/plaintiff-bank, and the relevant portion of the cross-examination of the defendant no.2 who is the sole proprietor of defendant no.1, show, that the payment which has been made to the defendants no.3 and 4 has the effect of the benefit to defendants no. 1 and 2 who have received fabric from the defendants no. 3 and 4, inasmuch as the liability of the defendants no. 1 and 2 towards the defendants no. 3 and 4 would stand satisfied. The provision of Section 70 of the Indian Contract Act is contained in Chapter V thereof, and which is a Chapter pertaining to liabilities created in those situations, where a contract between the parties does not exist. In spite of the fact that there is no contract, Section 70 of the Indian Contract Act fastens liability once benefit is either directly or indirectly received.

I put it to the learned senior counsel for the appellants/defendants no. 1 and 2 as to whether at any point of time any

letter or notice was sent to the defendants no. 3 and 4 or was any suit filed against defendants no. 3 and 4 in which the appellants/defendants no.1 and 2 had at least, if not anything else, made averments and allegations of the defendants no. 3 and 4 deriving benefit under the banker's cheque without their being any liability of the defendants no. 1 and 2 towards the defendants no. 3 and 4. Since there is nothing on record before the Trial Court, learned senior counsel for the appellants had to agree that there is nothing filed in the Trial Court to show that any such letter or notice was sent on behalf of the appellants/defendants no. 1 and 2 to defendants no. 3 and 4 or any suit was filed against defendants no. 3 and 4.

9. The Trial Court whereas in para 17 of the impugned judgment has held that the appellants/defendants no. 1 and 2 had given no instructions for crediting the amount to the defendants no. 3 and 4, however, in para 19, the Trial Court held that since direct benefit was granted to the defendants no. 3 and 4 for and on behalf of the appellants/defendants no. 1 and 2, the appellants/defendants no. 1 and 2 would be liable to pay the suit amount.

Paras 17 and 19 of the impugned judgment read as under:-

“17. The plaintiff bank had pleaded that the said amount was paid by the plaintiff bank to the defendants No. 3 & 4 for and on behalf of the defendants No.1 & 2,

whereas the same has been disputed by the defendants No.1 & 2, contending that the defendants No.1 & 2 had not instructed the plaintiff bank to pay the said amount directly to the defendants No.3 & 4. This contention appears to have substantial weight and merit since the plaintiff bitterly failed to prove any instruction given in writing by the defendants No. 1 & 2 to pay the said amount straightway to the defendants No.3 & 4. However, it is not in dispute in view of the pleadings of the record as well as evidence led by both the parties that the defendants No. 1 & 2 had applied for granting the packaging Credit Limit to the tune of ₹4 lakhs. It is also not in dispute that in order to avail such facility the defendant No. 1 & 2 had also opened a current account by depositing ₹500/- with the plaintiff bank, but the said amount of ₹3 Lakhs had neither been credited in the account of the defendants No.1 & 2 for the payment of the same directly to the defendant No. 1 & 2 and for crediting the said amount in the account of the defendant No. 1 & 2 and in the absence of any document proved on record for depositing the said bankers cheque in the account of the defendant No.1 & 2 so opened, I find that the plaintiff bitterly failed to prove the facts that the said amount has either been paid at the instructions of defendants No. 1 & 2 to the defendants No. 3 & 4. Therefore, in those circumstances, I find that the plaintiff bitterly failed to prove its entitlement to recover any amount from the defendants No. 1 & 2, since neither the said amount has been paid to the defendants No. 1 & 2 nor the said amount has been paid at the instructions of the defendant No. 1 & 2, directly to the defendant No. 3 & 4. Merely because the defendants No. 1 & 2 had made the request to grant the Packaging Credit Facility and had opened a current account and deposited ₹500/- with the plaintiff bank, does not create any liability to pay the said amount, which had never been paid by the plaintiff bank either to the defendant No. 1 & 2 or upon

the instructions of the defendants No. 1 & 2 to the defendants No. 3 & 4.

19. The then Manager and the Officer while signing the said Manager's Cheque had neither ensured to take any security either from the defendants No. 3 & 4 or from the defendants No. 1 & 2 for releasing the payment, I find that both the defendants No. 5 & 6 are well-intended to grant the benefits to those defendants, directly and indirectly. The defendants No. 5 & 6 have conducted in such a manner that they had facilitated to pay ₹3 Lakhs, directly to the defendants No. 3 & 4 on behalf of the defendants No. 1 & 2 and therefore, this was the direct benefit granted to the defendants No. 3 & 4 for and on behalf of the defendants No. 1 & 2, without any liability to be repaid by them, if the same is not paid by the defendants No. 1 & 2. So, this is the illegal benefit given by the defendants No. 5 & 6 to the defendants No. 3 & 4. At the same time direct benefit has been given to the defendants No. 1 & 2 as the said payment was made for and on behalf of the defendants No. 1 & 2, though no such written instruction was there, by the payment ultimately has been made for and on behalf of the defendants No. 1 & 2, as admitted by the defendants No. 3 & 4, in their WS and such liability not disputed by defendants No. 1 & 2. The illegal benefit had been given by the defendants No. 5 & 6 to the defendants No. 1 & 2 by not getting any document executed and signed in that regard, before releasing the said payment to the defendants No. 3 & 4. Therefore, the defendants No. 1 & 2 are also beneficiary to that transaction and by the conduct of the defendants No. 5 & 6, they had proved not only their connivance but also conspiracy to release such payment without securing the proper documents for their repayment and therefore, I find that in that regard liability arises on all the persons who are the beneficiary of such transaction either

directly or indirectly. Therefore, I find that the plaintiff has proved its case against all the six defendants to recover the amount of ₹Lakhs being the principal amount that was released without procuring the proper documents from the defendants No. 1 & 2 and the defendants No. 3 & 4, respectively.”

10. Learned senior counsel for the appellants/defendants no. 1 and 2 very vehemently argued that no instructions were ever given by the appellants/defendants no. 1 and 2 to the respondent no.1/plaintiff-bank to make payment to the defendants no. 3 and 4 and therefore the appellants/defendants no.1 and 2 cannot be held liable. It is also argued that defendants no. 5 and 6 acted illegally without any packing credit limit being sanctioned in favour of the defendants no. 1 and 2, and therefore, any payment which was made to the defendants no. 3 and 4 would be an illegal payment, not making the appellants/defendants no. 1 and 2 liable. Reliance is placed by the learned senior counsel for the appellants/defendants no. 1 and 2 upon para 17 as aforesaid and also on para 4 of the impugned judgment which refers to the pleading of the defendants no. 3 and 4 of the amount being owed to the defendants no. 3 and 4 by the appellants/defendants no. 1 and 2.

11. In my opinion, the question which is posed on behalf appellants/defendants no. 1 and 2 by its learned senior counsel and seeking to answer such question by reference to para 17 of the impugned judgment, is an argument which begs the question on which it is based. This I say so because I have already accepted the fact that there is no contractual relationship between the respondent no.1/plaintiff-bank and the appellants/defendants no. 1 and 2 and that appellants/defendants no. 1 and 2 never gave any specific contractual instructions to make payments to the defendants no. 3 and 4 and which findings are contained in para 17 of the impugned judgment. However, the appellants/defendants no. 1 and 2 may not be liable for collusion with the defendants no. 3 and 4, but the fact of the matter is that there is payment made by the banker's cheque in favour of the defendants no. 3 and 4 and by which the appellants/defendants no. 1 and 2 have got the benefit. The entire claim of the respondent no.1/plaintiff-bank in the present case is based not on contract or contractual instruction qua the manager's cheque/pay order but on Section 70 of the Indian Contract Act, 1872. I have already re-produced above the para 5 of the plaint and the para 10 of the affidavit by way of evidence filed on behalf of the witness, Sh.J.S.Tib on behalf of the respondent no.1/plaintiff-bank. The

necessary requirements of Section 70 of the Indian Contract Act, 1872 are clearly proved to have been satisfied by the respondent no.1/plaintiff-bank entitling it to a decree against the appellants/defendants no. 1 and 2 also, inasmuch as, appellants/defendants no. 1 and 2 have got the benefit of payment having been made to the defendants no.3 and 4, to whom, as per the pleading of the defendants no. 3 and 4, and also as per the evidence led by the respondent no.1/plaintiff-bank, amounts were owed by them. I have also referred to the fact that it is admitted by the defendant no.2/appellant no.1 in his cross-examination that there were dealings between the appellants/defendants no. 1 and 2 and the defendants no. 3 and 4, whereby, the defendants no. 3 and 4 had supplied fabric to the appellants/defendants no. 1 and 2.

12. A conclusion of the above is that payment of ₹3,00,000/- was made in the favour of defendants no. 3 and 4. This payment was wrongly made on behalf of the plaintiff-bank/respondent no.1 on account of the collusion of its officers namely the defendants no. 5 and 6. There were also contractual dealings between the appellants/defendants no. 1 and 2 on the one hand as the buyers and defendants no. 3 and 4 as the sellers/suppliers on the other hand. The defendants no. 3 and 4 have got benefit of payment

in its account of the amount of the banker's cheque, and with respect to which surely, the appellants/defendants no. 1 and 2 have got the benefit. The appellants/defendants no. 1 and 2 have led no evidence, and there is no deposition in the affidavit by way of evidence filed on behalf of the defendant no.2/appellant no.1, that the appellants/defendants no. 1 and 2 have not received any benefit on account of payment having been made by the plaintiff-bank/respondent no.1 to the defendants no. 3 and 4. Surely, the minimum which the appellant no.1/defendant no.2 ought to have done in view of the aforesaid pleading and evidence led on behalf of the plaintiff-bank/respondent no.1, was at least to make an averment in the deposition which was made that they have received no benefit directly or indirectly on account of any payment having been made by the plaintiff-bank/respondent no.1 to the defendants no. 3 and 4. There is, however, not even a whisper to this effect in the affidavit by way of evidence filed on behalf of the appellant no.1/defendant no.2.

13. A civil case is decided on balance of probabilities. In the facts of the present case it has been established on the basis of preponderance of probabilities that effect of payment which has been made by the respondent no.1/plaintiff-bank to the defendants no. 3 and 4, though on account of

illegal collusion of its officers, defendants no. 5 and 6, is that benefit is derived by the appellants/defendants no.1 and 2, who are therefore jointly and severally liable, as rightly held by the Trial Court in para 19 of the impugned judgment.

14. In view of the above, I do not find any error in the impugned judgment, which calls for interference by this Court in the appeal.

15. In view of the above, there is no merit in the appeal, which is accordingly dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J

JANUARY 30, 2012
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