

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

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Date of decision: 12th February, 2016

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RFA No. 128/2015

M/S GEODIS OVERSEAS PVT LTD

..... Appellant

Through: Mr. Jitender Mehta, Adv.

versus

PUNJAB NATIONAL BANK

..... Respondent

Through: Mr. Ajay Bahl, Adv.

CORAM:-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The appeal impugns a judgment and decree, dated 15th October, 2014 of the Court of the Additional District Judge (ADJ)-06, South District, Saket Courts, New Delhi, of dismissal of a suit filed by the appellant, for recovery of Rs. 6 lacs from the respondent Bank as not maintainable.
2. Notice of the appeal was issued and the Trial Court record requisitioned.
3. Admit.
4. Considering the fact that if the appeal were to be allowed, the matter will have to be remanded back for trial, with the consent of the counsels the appeal is taken up for hearing today itself.
5. The counsel for the appellant has been heard. The need to hear the

counsel for the respondent Bank has not arisen.

6. The appellant instituted the suit pleading, (i) that it is carrying on business as a freight forwarding agency and during the course of its business receives Demand Drafts (DD) from its clients in favour of the shipping lines carrying the goods of the clients of the appellant and submits the said DDs with the shipping line to cover / secure the shipping line for damage if any caused to the shipping line during de-stuffing of the containers of the shipping line and the said DDs are kept by the shipping line with themselves, to be encashed in the event of any damage being caused and to be returned if no damage is caused; (ii) that the appellant in the course of its business received a DD for Rs.6 lacs drawn on HDFC Bank, New Delhi from its client Reliance Communication Ltd. (Reliance) and submitted the same to the shipping line CSAV Group Agencies (India Pvt. Ltd.) (CSAV); (iii) however when Reliance asked the appellant for return of the said DD, the appellant realised that the receipt obtained by it of deposit of the said DD from CSAV had been misplaced in the office of the appellant and intimated CSAV so and asked CSAV for return of the DD; (iv) CSAV informed the appellant that the aforesaid DD of Rs.6 lacs had already been collected from their office; (v) that the appellant on making enquiries learnt that the said

DD had been encashed by opening an account in the name of CSAV at the respondent/defendant Bank and a sum of Rs.2 lacs had already been withdrawn from the said account in the name of CSAV with the respondent Bank; and, (vi) on alarm being raised, the balance amount of Rs.4 lacs then still lying in that account with the respondent Bank was frozen (the counsel for the appellant informs that the said amount is still lying frozen). The suit from which this appeal arises was filed impleading the respondent Bank only as a defendant thereto, claiming the said amount of Rs.6 lacs from the respondent Bank contending that the respondent Bank had opened the bank account in which the aforesaid DD was encashed without satisfying itself of the identity of the persons who had opened the bank account in the name of CSAV and without complying with the procedures prescribed by the Reserve Bank of India (RBI) for opening of bank account and owing to the said negligence of the respondent Bank, the appellant had suffered a loss since Reliance has deducted the amount of Rs.6 lacs from the dues of the appellant.

7. The respondent contested the suit by filing a written statement (but the need for going therein is not felt since the suit has been dismissed on the aspect of maintainability) and on the pleadings of the parties issues framed

on 11th January, 2012 and the matter posted for evidence of the appellant.

8. Thereafter the matter was adjourned for appellant's evidence on 28th March, 2012, 12th July, 2012, 13th December, 2012 & 8th February, 2013 on the request of the appellant and finally one of the witnesses of the appellant/plaintiff was examined, cross examined and discharged on 11th July, 2013. Thereafter the matter was again adjourned for remaining evidence of the appellant/plaintiff on 12th September, 2013, 9th January, 2014, 7th April, 2014, 13th May, 2014, 4th July, 2014, 8th August, 2014, 10th September, 2014 and 10th October, 2014. It may be mentioned that the appellant/plaintiff during this time was seeking to examine the witness from Reliance.

9. During the hearing on 15th October, 2014, the trial court finding that there was no privity of contract between the parties, heard arguments on maintainability of the suit and vide impugned order / judgment passed on the same date dismissed the suit as not maintainable, reasoning (i) that the appellant/plaintiff has failed to show any privity with respondent Bank; (ii) that according to the appellant/plaintiff also it was the CSAV which was supposed to return the DD to the appellant/plaintiff and who had lost the DD and the cause of action if any of the appellant/plaintiff was against CSAV

and not against the respondent Bank as it was owing to the negligence of CSAV that the appellant/plaintiff claimed to be suffering; (iii) that the appellant/plaintiff has no *locus standi* to file suit against the respondent Bank; (iv) that the appellant/plaintiff had no cause of action against the respondent Bank.

10. The counsel for the appellant/plaintiff in his initial arguments contended that the matter is fully covered by the judgment dated 21st March, 2011 of this Court in RFA No.524/2004 titled ***Oriental Bank of Commerce Vs. Pawan Kumar Aggarwal*** but upon enquiry as to how the facts of the present case can be said to be even similar to the facts of the judgment cited, the counsel did not press the said argument. However now when this order is being dictated, the counsel for the appellant/plaintiff again states that the case is identical and relies on observations in para 7 of the said judgment.

11. I have perused the said judgment and do not find it to be a constituting a precedent on the proposition. Therein, a judgment and decree for recovery of amount of the cheque against the bank on which the cheque was drawn was upheld finding that the bank had misplaced the cheque when it was presented for payment and had made payment thereunder treating the cheque to have been converted from 'account payee' to 'bearer' on the basis of

signatures not of the account holder. Per contra there is no such negligence of the respondent Bank in the present case.

12. The counsel for the appellant/plaintiff has then contended that the opening of the account by the respondent Bank in the name of CSAV and in which the cheque was encashed was without following the RBI Guidelines.

13. He is however unable to show the Guidelines and states that “that is the general principle”.

14. I have considered the contention of the appellant/plaintiff and perused the Trial Court record.

15. The appellant/plaintiff in the present case can by no stretch of imagination be stated to be the ‘holder’ of the negotiable instrument (i.e. DD for Rs.6 lacs) within the meaning of Section 8 of the Negotiable Instruments Act, 1881 which describes ‘holder’ as a person entitled in his own name to the possession of the negotiable instrument and to receive or recover the amount due thereon from the parties thereto. Section 8 further provides that it is only the ‘holder’ who is entitled to the amount thereof. The appellant/plaintiff cannot also be described as a ‘holder in due course’ of the said negotiable instrument within the meaning of Section 9 of the said Act inasmuch as the appellant/plaintiff at no time, for consideration, became the

possessor of the said negotiable instrument. It has been held by the Supreme Court in *Milind Shripad Chandurkar Vs. Kalim Khan* (2011) 4 SCC 275, *National Small Industries Corporation Ltd. Vs. State* (2009) 1 SCC 407 and *Punjab & Sindh Bank Vs. Vinkar Sahkari Bank Ltd.* (2001) 7 SCC 721 that it is only a holder in due course of a negotiable instrument who is entitled to complain with respect thereto and/or to realise the money which the negotiable instrument represents.

16. The appellant/plaintiff as per its own admission was merely a facilitator and carried the DD drawn by Reliance in favour of CSAV from Reliance to CSAV.

17. If at all Reliance, contrary to the contract with the appellant/plaintiff, withheld any dues of the appellant/plaintiff, the claim of the appellant/plaintiff therefor would be against Reliance.

18. The privity of contract according to the appellant/plaintiff also was between the appellant/plaintiff, Reliance and CSAV and if the dues of the appellant/plaintiff from Reliance have been held owing to any conduct of CSAV, the remedy if any of the appellant/plaintiff was to institute the suit impleading both Reliance and CSAV as parties thereto and in which suit may be the respondent Bank could also have been impleaded as a party.

Without Reliance and CSAV being parties to the claim of the appellant/plaintiff in the suit, the suit was also bad for non-joinder of necessary parties.

19. I may in this context observe that the appellant/plaintiff appears to have not taken the said steps being fully aware it was itself to blame, having misplaced the receipt obtained from CSAV of deposit of the DD with CSAV, by way of security deposit, and on presentment of which receipt CSAV was liable to return the DD and is admitted to have been done. The appellant/plaintiff appears to have been apprehensive that in the event of CSAV being impleaded as a party, the negligence of the appellant/plaintiff itself would come to the fore and chose to proceed against the respondent Bank only.

20. Though the counsel for appellant/plaintiff has failed to show the binding instructions in violation of which the respondent Bank is claimed to have opened the account in which the DD is stated to have been encashed but even if it were to be assumed that the respondent Bank was negligent to the said extent, the same would still not entitle the appellant/plaintiff to any relief against the respondent Bank, for the reasons already stated and on the principle of comparative headship and “*pari delicto, potior est conditio*

defendants” i.e. in equal fault better is the condition of the defendant.

21. The rule of equity formulated in this regard in ***Lickbarrow Vs. Mason*** (1787) 102 E.R. 1192 and recognized by the Supreme Court in ***The New Marine Coal Co. (Bengal) Private Ltd. Vs. Union of India*** AIR 1964 SC 152 and ***Bhagwandas Goverdhandas Kedia Vs. Girdharilal Parshottamdas and Co.*** AIR 1966 SC 543 is that whenever one of two innocent parties must suffer by the act of third, he who has enabled such person to occasion the loss must sustain it.

22. I am therefore of the view that there is no error in the order of the learned ADJ holding the suit to be not maintainable as per averments in the in the plaint itself and resultantly the judgment and decree of dismissal of suit cannot be said to be erroneous.

23. The counsel for the appellant/plaintiff has also argued that the trial being underway the learned ADJ erred in dismissing the suit.

24. There is no merit in the said contention also. Supreme Court in ***I.T.C. Limited vs. Debts Recovery Appellate Tribunal*** (1998) 2 SCC 70 relying on ***Azhar Hussain Vs. Rajiv Gandhi*** (1986) 1 SCC 573 negated the contention that once issues have been framed the matter has to necessarily go to trial, holding that a litigation which is meaningless and bound to prove

abortive should not be permitted to occupy the time of the court. Similarly in *Abdul Gafur Vs. State of Uttarakhand* (2008) 10 SCC 97 and in *P.P.A. Impex Pvt. Ltd. Vs. Mangal Sain Mittal* 166 (2010) DLT 84 (DB) it was held that if on a meaningful not formal reading the pleading is found to be manifestly vexatious and meritless, not disclosing a right to sue and implausible, the court should exercise its power and should not permit it to go to trial. Reference may also made to *T. Arivandandam Vs. T.V. Satyapal* (1977) 4 SCC 467 and *Liverpool and London S.P. and I Asson. Ltd Vs. M.V. Sea Success I* (2004) 9 SCC 512 where it was held that proceeding in which there is no possibility of success and are deadwood and are doomed should be shot down at the earliest stage and ought not to be permitted to clog the resources of the Court and at the cost of other deserving matters requiring attention of the Courts. To the same effect is *Shipping Corporation of India Ltd. Vs. Machado Brothers* (2004) 11 SCC 168. I have also held so in *P.S. Jain Co. Ltd. Vs. Atma Ram Properties (P) Ltd.* 205 (2013) DLT 302 and in *Sanjay Sharma Vs. Madan Mohan Sharma* MANU/DE/1999/2013.

25. In the present case the appellant/plaintiff is found to have kept the trial pending at the stage of recording of his own statement for inordinately long

time and the learned ADJ at the time of entertaining the request of the appellant/plaintiff for opportunity for summoning of the witnesses having become aware of the controversy and having heard the arguments on the maintainability cannot be said to have acted in violation of the procedure established by law.

Dismissed.

No costs.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J

FEBRUARY 12, 2016

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