

(2006) 02 DEL CK 0003

In the Delhi High Court

Case No : IA. No. 11757 of 2003 in CS (OS) 1678 of 2003

BPDL Investments (Pvt.) Ltd.

APPELLANT

Vs

Maple Leaf Trading International (Pvt.) Ltd.

RESPONDENT

Date of Decision : 22-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 3, 151
Negotiable Instruments Act, 1881 (NI) — Section 125, 20, 49, 86, 87

Citation : (2006) 3 BC 482 : (2006) 129 DLT 94 : (2006) 87 DRJ 761

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : H.L. Tikku, Naval Bhatia and Yashmeet, for the Appellant; Kirtiman Singh, for the Respondent

Final Decision : Allowed

Judgement

Badar Durrez Ahmed, J.—This is an application under Order 37 Rule 3 of the Code of Civil Procedure, 1908 read with Section 151 thereof on behalf of the defendant for grant of leave to defend the summary suit instituted by the plaintiff. The case against the defendant is that the defendant had engaged the services of the plaintiff for conducting market research surveys in India with respect to the business interest of the defendant pertaining, inter alia, to the sale of Canadian Gold Coins. It is alleged in the plaint that the defendant had engaged the services of the plaintiff and the plaintiff had carried out surveys etc and had rendered such services but the defendant had not paid for the same.

2. The learned counsel for the defendant/applicant submitted that the entire plaint is based upon the four cheques which are mentioned in paragraph 14 of the plaint which amount to a sum of Rs. 1,34,32,500/-. The details of the cheques which were all drawn on ABN AMRO Bank are as under:

Cheque No.	Date	Amount (Rs.)	566847	12-09-2000	44,77,500	566848
12-09-2000	29,85,000	566849	UN DATED	29,85,000	566850	UN DATED
29,85,000						

It is the plaintiff's case that these cheques were in acknowledgment of the defendant's liability as confirmed by the defendant vide its letter dated 12.9.2000.

3. Before I examine the merits and de-merits of the contentions of the parties, it would be necessary to point out certain background facts as mentioned in the plaint. Apparently, in July and August 1999 the defendant issued four cheques totaling Rs. 1,25,37,000/- in favor of the plaintiff. When these cheques were presented they were returned to the plaintiff by its bankers with the endorsement "Frozen Account". It is pertinent to note that the defendant had during that period i.e., 1999 encountered various difficulties including prosecution under the Foreign Exchange Regulations Act and the Indian Penal Code. As a result of which, the defendant's accounts had been frozen. It is also to be noted that the defendant's account had been frozen by the Reserve Bank of India in connection with alleged Foreign Exchange Regulations Act violations. It is stated by the learned counsel for the defendant that the defendant has been acquitted in all these proceedings although a SLP is still pending before the Supreme Court. Some of the orders passed in the proceedings have also been placed by the defendant. It is in this background that the four cheques which were issued in July, August, 1999 could not be encashed by the plaintiff.

4. It is further stated in the plaint that upon the plaintiff approaching the defendant, the defendant issued another cheque dated 18.3.2000 for the entire amount of Rs.1,25,37,000/- drawn on ABN AMRO Bank, New Delhi in favor of the plaintiff. However, as indicated in paragraph 13 of the plaint, the defendant requested the plaintiff not to present the cheque till the defendant's account was de-frozen. It is also stated in the said paragraph that the defendant had assured the plaintiff that the account would be de-frozen during the validity period of the cheque i.e., within six months. However, without obtaining the go ahead from the defendant, the plaintiff presented the cheque for encashment on 11.9.2000 and the same was dishonored and returned with the endorsement "Account Blocked by R.B.I.". This led to the issuance of the third set of four cheques which have been detailed above. The total amount of these four cheques was Rs.1,34,32,500/-. It was computed by adding a further sum of Rs.9,00,000/- to the earlier sum of Rs.1,25,37,000/- with some deductions on account of TDS and service charges. According to the plaintiff this was in clear acknowledgment of the defendant's liability for making payment of the said amount.

5. Upon examination of the details of the four cheques, it becomes apparent that two cheques were said to be dated 12.9.2000 and two cheques were un-dated. Paragraph 15 of the plaint reveals that after issuing and handing over the said four cheques, the defendant requested the plaintiff to present the said cheques only after receiving confirmation from the defendant. Paragraph 16 of the plaint indicates that the plaintiff had time and again requested the defendant to either confirm the date of presentation of the cheques or in lieu thereof pay the amount from other sources. It is also averred that despite all such requests, the

defendant deferred such confirmation on one pretext or the other and that the plaintiff was left with no other option but to issue a statutory notice and present the cheques for encashment. However, as indicated in paragraph 16 of the plaint only two cheques i.e., the undated cheques were presented to the bankers for encashment on 2.7.2003. There is no averment in the plaint with regard to the presentment of the other two cheques which were dated 12.9.2000. It is obvious that they could not have been presented on 2.7.2003 as the same would clearly be beyond the validity period of the said cheques which is normally six months. The two undated cheques which were presented were returned with the endorsement "Attachment Order". This suit has been instituted on the basis of these four cheques as would be apparent from a reading of paragraph 21 of the plaint and no other claim which does not fall within the ambit of Order 37 is claimed for in the present suit.

6. In the context of these facts, it was submitted by the learned counsel for the applicant/defendant that since the suit is based upon two cheques which was never presented, the same would not be maintainable under Order 37 but would have to be dealt with as an ordinary suit for recovery of money. In support of this proposition, he placed reliance on two decisions :- Dharam Pal v. Sate 24(1983) DLT 3 and Goyal Tax Feb. Pvt. Ltd. Vs. Anil Kapoor Proprietor Supriya Fashion, .

7. In the latter decision it was observed by a learned Single Judge of this court that cheques which were not presented for encashment during the validity period could not form the basis of a suit under Order 37 of the code of Civil Procedure, 1908 and Therefore, the suit should be tried as an ordinary suit.

8. The second ground taken by the learned counsel for the applicant/defendant is that if there is any material alteration in any negotiable instrument then such an alteration, by virtue of the provisions of Section 87 of the Negotiable Instruments Act, would render such an instrument void. Section 87 of the Negotiable Instruments Act, 1881 reads as under:

87. Effect of material alteration.- Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;

Alteration by indorsee:- And any such alteration, if made by an indorsee, discharges his endorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of Sections 20, 49, 86 and 125.

9. Upon a reading of the aforesaid section, it becomes clear that if there is a material alterations of the kind referred to in a cheque then the cheque would become void. What is to be noted however are the two considerations indicated in the section itself. For a cheque or other negotiable instrument to remain valid

despite material alterations, the material alteration must be with the consent of the other party and unless it was made towards the furtherance of a common intention. In other words if the alteration is consented to by the parties then, even if it is material, it will not render the instrument void. Moreover, if the alteration is made towards the common intention of the parties then again such an alteration would not render the instrument void. In the context of the facts of the present case, the learned counsel for the applicant/defendant submitted that the two undated cheques were obviously dated subsequently by the plaintiff on or before the time of presentation of the said cheques which is alleged to have been done on 2.7.2003. Therefore, it amounts to the situation where the date of an instrument is altered. That an alteration in a date on a negotiable instrument amounts to a material alteration in the terms indicated u/s 87, has been made clear by various decisions referred to by the learned counsel being:

1. K.M. Basappa and Anr. v. Patel Marule Gowda and Anr. AIR (38) 1951 Mys 102

2. Vakkalagadda Kondiah Vs. Channamsetty Pedda Pulliah and Others,

3. Allampati Subba Reddy Vs. Neelapareddi Ramanareddi,

4. Jayantilal Goel Vs. Zubeda Khanum,

10. The last of the aforementioned cases placed reliance on the earlier decision of the same High Court in Allampati Subba Reddy Vs. Neelapareddi Ramanareddi, . Paragraph 6 of the 1986 decision is relevant and is set out hereunder :-

6. Now, a look at Ex.A. 1 pro-note itself makes it apparent that the date, which is in a different ink, that is, other than the ink that has been used for body of the pro-note, is a subsequent introduction into the document. This insertion also amounts to "material alteration", as it takes in not only a case where certain thing which is already written has been altered or erased, but also a new insertion. (See Allampati Subba Reddy Vs. Neelapareddi Ramanareddi,).

11. This clearly indicates that the insertion of a date where there was no date amounts to a material alteration, as contemplated u/s 87 of the Negotiable Instruments Act, 1881. The only question that remains to be seen in this case is whether this material alteration was with the consent of the defendant and whether it was in furtherance of the common intention. It is clear from the averments made in the plaint itself that the said cheques which included the undated cheques were to be presented only after the defendant confirmed the same. It is also made clear in paragraph 16 of the plaint that no such confirmation was forthcoming from the defendant. Yet, the plaintiff presented the cheques. Taking a prima facie view, there was no consent to the alteration in the dates and the presentment of the cheques on behalf of the defendant. Therefore, prima facie it cannot be construed as a situation where the defendant consented to the alteration in the dates. Nor was it a part of the common intention of the plaintiff and the defendant to alter the dates in the cheque. If this were to be the

case then the cheques would become void by virtue of the provisions of Section 87 of the Negotiable Instruments Act, 1881.

12. The learned counsel for the plaintiff stated that the defense that is being sought to be raised by the defendant is clearly moonshine. He once again took me through the averments made in the plaint to indicate that in the first instance four cheques were issued as indicated in paragraph 10 and they were dishonoured. Thereafter, one cheque for the entire amount of Rs.1,25,37,000/- was again issued by the defendant on the assurance that the account would be de-frozen within six months. That was not done and on presentation this cheque was also dishonoured. Thereafter, the defendant again issued four cheques as mentioned in paragraph 14 of the plaint and detailed above. According to the learned counsel for the plaintiff these cheques were issued in clear acknowledgment of the defendant's liability to pay the said amount to the plaintiff and, Therefore, the defendant cannot now turn around and say that the amount was not payable.

13. The principles for grant of leave to defend were set out in the Supreme Court decision in *Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation*, and particularly in paragraph 8 thereof which reads as under:

8. In *Smt Kiranmoyee Dassi v. Dr. J. Chatterjee Das, J.*, after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by Order 17 C.P.C. in the form of the following propositions (at p. 253) :

(a) If the defendant satisfies the court that he has a good defense to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defense, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to

sign judgment, the court may protect the plaintiff by only allowing the defense to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defense.

14. I am of the view that the defendant is entitled to unconditional leave to defend. This is so because the defendant has been able to raise a triable issue with regard to the validity of the cheques which form the foundation of the suit. As indicated above, there are two decisions of this court which show that a suit under order 37 cannot be maintained on the basis of stale cheques. Two of the four cheques were stale and were never presented. It is further to be noted that the other two cheques were materially altered and, therefore, taking a prima facie view, a plausible and reasonable defense has definitely been raised as to what would be the effect of such alteration. It is a matter of trial which would ultimately decide as to whether such alteration would have the effect of rendering the two cheques to be void or not. Certainly, at this stage taking a prima facie view one is of the opinion that the defendant has been able to raise triable issues with regard to the validity of the cheques. The plaintiff may have an excellent case for recovery of money from the defendant but that has to be seen after a full blown trial and not by way of this summary suit. Accordingly, this application for leave to defend stands allowed.

15. All observations made in this order are only of a prima facie nature. The application stands disposed of.