(1998) 01 DEL CK 0022

In the Delhi High Court

Case No : IAs No. 2236/96 and 2647/96 in S.No. 1847/95

Ceat Financial Services Ltd. APPELLANT

Vs

Mardia Copper Products Ltd. and Another RESPONDENT

Date of Decision : 19-01-1998

Acts Referred:

Citation : (1998) 3 AD 281 : (1998) 74 DLT 252

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : Sh. Deepak Dhingra, for the Appellant; Sh. Rajiv Nayyar and Ms. Sujata Kurdukar, for the Respondent

Judgement

K.S. Gupta, J.—plaintiff filed suit under Order xxxvII CPC alleging that it is a public limited company incorporated under the Companies Act, 1956. Rajesh Relan, Regional Manager has been authorised to sign and verify the plaint and to institute the suit. On defendants approaching the plaintiff company ,the plaintiff advanced Rs. 12,16,000/- to them in consideration whereof they drew and executed a hundi bearing No. MCPL-114 dated 17th August, 1994 in favor of the plaintiff at Delhi for the said amount payable at 90 days from the date of drawing and execution. Hundi was drawn against invoice No. MEL/083/94 dated 17th August, 1994 of defendant No. 2 for sale of copper. To secure the payment both the defendants drew cheque dated 15.11.94 in the sum of Rs. 12,16,000/- each in favor of the plaintiff company .It is alleged that the plaintiff by the letter dated 8th November, 1994 intimated the drawer, i.e., defendant No. 1 that it will be presenting for payment the cheque drawn by it. Accordingly, cheque was presented on 15th November, 1994 for payment but it was returned unpaid by the banker on 16th November, 1994 with the remarks "Insufficient Funds". Having not received the payment from defendant No. 1, the plaintiff presented for payment the cheque drawn by defendant No. 2 but that too was returned with the remarks "Account Closed".

2. It is pleaded that on 17th November, 1994, defendant No. 1 in connivance

with defendant No. 2 sent a letter to the plaintiff that it is in receipt of a letter from a defendant No. 1 for not presenting the cheque drawn by defendant No. 1 in favor of the plaintiff. Defendant No. 2 requested the plaintiff that the cheque drawn by defendant No. 1 be not presented till further advice. plaintiff thereafter got served a legal notice dated 27th November, 1994 calling upon the defendants to pay the aforesaid amount and that notice was duly received by both of them. On being pressed, defendant No. 2 issued a cheque bearing No. 650652 drawn on Vijay Bank, New Delhi on 7th December, 1994 for the aforesaid amount in favor of the plaintiff in lieu of dishonoured cheque No. 152439 dated 15th November, 1994. This cheque also on presentation was returned unpaid with the remarks "Payment Stopped By Drawer". plaintiff again not served a legal notice dated 6th January, 1995 calling upon defendant No. 2 to discharge the liability under the hundi. In response to this legal notice, both the defendants called upon the plaintiff on 13th January 1994 and requested it not to initiate any legal action against them and to render to them a complete statement of account containing interest till date, which the plaintiff did. Defendants paid interest to the plaintiff calculated on the principal amount of Rs. 12,16,000/- till December 31, 1995 @ 2.5% per month. Defendants further agreed to repay the amount in three installments of Rs. 4,00,000/- each exclusive of interest and the last Installment was to be paid on January 27, 1995. However, defendants again failed to pay the amount to the plaintiff in terms of the agreed payment schedule. It is further alleged that on 20th January, 1995, defendant No. 2 tendered four cheques and one pay order to the plaintiff in the sum of Rs. 2,00,000/- each Along with covering letter dated 20th January, 1995. Pay order No.012170 fpr Rs.2,00,000/- tendered by defendant No. 2 by way of first Installment was encased by the plaintiff. However, four cheques on presentation at their respective dates were returned unpaid. Rs. 12,16,000/- being the amount of the hundi, Rs. 2,12,800/- being the amount of interest @ 2.5% per month on the said sum w.e.f. January 1, 1995 till the date of filing of the suit, less Rs. 2,00,000/- paid by the defendants, totalling Rs. 12,28,800/- are due from the defendants. It is this amount for recovery whereof suits stands filed by the plaintiff company against the defendants.

3. By filing is No. 2236/96 which is supported by the affidavit of Sunil Mardia, director, the defendant No. 1 has sought leave to contest the suit. It is stated that Ashok Mehta, promoter director of defendant No. 2 is a close relative of Sunil Mardia. In the year 1994, both of them enjoyed relationship of mutual trust and confidence and Sunil Mardia based upon the persuasion of Ashok Mehta who desired to raise some funds, signed blank hundi and cheque in July/August 1994. It was assured by defendant No. 2 that the amount raised against the discounting of the hundi will be handed over to defendant No. 1. Ashok Mehta discounted the hundi with the plaintiff and the entire amount thereof was used fraudulently by defendant No. 2 alone. It was only in mid November, 1994 that Sunil Mardia came to know of the fraud played on him on receipt of the letter dated 8th November, 1994 from the plaintiff. He immediately contacted Ashok

Mehta who informed him that all the money obtained by discounting the hundi was used by him and he too has given post dated cheque which would be honoured. Defendant No. 2 thereafter sent a letter dated 17th November, 1994 to the plaintiff company asking it not to present the cheque issued by defendant No. 1 to the bank for payment. It is asserted that defendant No. 1 or Sunil Mardia at no time approached the plaintiff to advance money to defendant No. 1 and there is, thus, no privity of contract between them. It is stated that in a series of correspondence, at numerous personal meetings and by its own conduct plaintiff accepted that defendant No. 1 had no liability to pay or in the alternative defendant No. 1 had been relieved of its liability to pay to the plaintiff. plaintiff''s conduct in accepting another cheque from defendant No. 2 on 7th December, 1994 in lieu of the dishonoured cheque and the plaintiff accepting on 20th January, 1995 four cheques and one pay order in the sum of Rs. 2,00,000/- each from defendant No. 2 go to show that the plaintiff at all times treated the liability to make the payment as that of defendant No. 2 alone. It is further alleged that no part of cause of action arose in favor of the plaintiff within the jurisdiction of this Court and the plaint has not been signed and verified and suit instituted by a duly authorised person on behalf of the plaintiff company .

4. It is stated that summons for judgment were received by defendant No. 1 at its'' office in Bombay on 14th February, 1996. Summons was then sent to Delhi and it was only thereafter that the Advocate in Delhi advised defendant No. 1 about the immediate necessity of filing an application for leave to defend. Thereafter, steps were taken to draft and file the application with utmost expediency. However, six days'' delay has occurred in filing the application.

5. is 2647/96 has been filed for seeking condensation of delay in question in filing application for leave to contest the suit.

6. plaintiff has filed replies to both the said applications which are supported by the affidavits of Rajesh Relan. is 2236/96 has been resisted on the averments somewhat similar to those made in the plaint. It is denied that the hundi and the cheque were signed by Sunil Mardia while they were blank or that it was only in mid November, 1994 that he became aware of the alleged fraud played by Ashok Mehta as alleged. It is further denied that there was no privity of contract between the plaintiff and defendant No. 1 on that defendant No. 1 was relieved of its responsibility to pay the amount by the plaintiff. It is stated that being the drawee of the hundi, it was the primary responsibility of defendant No. 1 to pay the suit amount. Hundi was executed at New Delhi, amount thereof was disbursed by the plaintiff at New Delhi, both the cheques dated 15th November, 1994 to secure the payment of the amount were drawn by the defendants at New Delhi and, Therefore, this Court has the territorial jurisdiction to try the suit.

7. In reply to is 2647/96 it is stated that no plausible Explanation has been given by defendant No. 1 for the condensation of delay in filing the application for leave to defend the suit.

8. Since is No. 2647/96 discloses sufficient ground for condoning the delay of 6 days'', that delay is condoned.

9. Submissions advanced by Sh. Rajiv Nayyar appearing on behalf of defendant No. 1 were mainly two fold. First, that there was no privity of contract between the plaintiff and defendant No. 1. Second, that there had been novation of contract between the parties within the meaning of Section 62 of the Contract Act and there under defendant No. 1 was relieved of its liability, if any, to pay the amount claimed by the plaintiff.

10. For appreciating particularly the second submission reference to a number of documents placed on Part I file has become necessary. It is not in dispute that after raising a debit note, plaintiff sent a letter on 8th November, signatures on the hundi dated 17th August, 1994 and also the cheque dated 15th November, 1994 in the sum of Rs. 12,16,000/-. It may be noticed that there is not the slightest whisper in any of the correspondence placed on the record about the signing of the said hundi and the cheque by Sunil Mardia while they were blank. It was for the letter from defendant No. 1 for not presenting its cheque in bank for payment. plaintiff was, Therefore, requested not to present the cheque till further advice. In the legal notice dated 27th November, 1994 at page 31 got issued by the plaintiff to defendant No. 1, it is interalia stated that to secure the amount of the hundi, cheque No. 183501 dated 15th November, 1994 in the sum of Rs. 12,16,000/- was issued by defendant No. 1 in plaintiff''s favor and the cheque on being presented had been returned unpaid by the bank. Defendant No. 1 was called upon to pay the said sum Along with interest within 15 days'' of the receipt of the notice by defendant No. 1. Another letter dated 9th December, 1994 at page 37 was sent by the plaintiff to defendant No. 1 with reference to its letter bearing No. MCPL/ND/391-A dated 29th November, 1994 Contents of that letter are somewhat identical to that of the notice dated 27th November, 1994. Defendant No. 2''s letter dated 17th December, 1994 at page 36 sent to defendant No. 1, copy of which was endorsed to the plaintiff, which is relevant reads thus :-

"Reference to your note dated 12th Dec., 1994 on fax & further personal discussions. We hereby relieve you of liability for payment to M/s. CEAT FINANCIAL SERVICES LTD. against our bill No. MEL/083/94 dated 17th Aug., 1994 for Rs. 12,16,000/- & corresponding Hundi No. MCPL/114 drawn against above Invoice.

In view of the present circumstances, we agree to pay the amount to M/s. CEAT FINANCIAL SERVICES LTD. Therefore you are requested not to make any payment to them against the above HUNDI/BILL."

11. It seems that before issuing the aforesaid letter defendants No. 2 issued another cheque bearing No. 650652 drawn on Vijay Bank, New Delhi for Rs. 12,16,000/- to the plaintiff in lieu of the dishonoured cheque dated 15th November, 1994 and that too on presentation to the bank, bounced. Legal notice

dated 6th January, 1995 got issued by the plaintiff to defendant No. 2 is at page 45. In terms of this notice, defendant No. 2 was called upon to pay the said sum of Rs. 12,16,000/- along with interest @ 2.5% per month from January 1, 1995 onwards. plaintiff further got served legal notice dated 18th January, 1995 on defendant No. 1 (at page 50) and the demand made in the notice is similar to that made in the aforesaid notice dated 6th January, 1995. Fax message dated 17th January, 1995 at page 48 sent by the plaintiff to Sunil Mardia of defendant No. 1 which is relevant reads as follows:

"We refer to our discussions have had with you on January 13, 1995 at the office of Marudhar Electronics Ltd., New Delhi, when you assured that Marudhar Electronics Ltd. shall pay and discharge their liability towards us in the sum of Rs. 12,16,000/- Along with interest in three installments, the whole sum to be paid and discharged by Jan. 27, 1995. That you further assured that on their failure to pay the very first Installment on Jan. 16, 1995, you shall pay and discharge the entire sum. As discussed, our Ms. Jyoti approached Marudhar Electronics Ltd. yesterday and furnished the Schedule of Payment which was accepted by them in confirmation. However, Mr. Anil Jain of Marudhar Electronics Ltd. assured the payment latest by today evening.

Accordingly, we expect the payment from Marudhar Electronics Ltd. latest by today evening, otherwise kindly issue a fresh Cheque/Demand Draft drawn in our favor for the said sum Along with penal interest in the sum of Rs. 17,652/- till Jan. 18, 1995, to be received by us by tomorrow evening.

We trust that you shall keep to your commitments and shall not constrain us to pursue with legal remedies which we have not ensued till date at your request and representation including action for winding up."

12. Schedule for payment in three installments is at page 47. As per the schedule, first Installment was to be paid on 16th January, 1995 while the second on 23rd January, 1995. Third Installment was to be paid on 27th January, 1995. Yet another fax message dated 18th January, 1995 addressed to aforesaid Sunil Mardia is at page 49 and it reads thus :-

"This is apropos to the discussions have had with you in the morning when you were appraised that Marudhar Electronics Ltd. has failed to make any payment to us as represented and promised by them and you. As intimated to us, we expect you here tomorrow in order to either get us the payment from Marudhar Electronics Ltd. or to make the said payment as promised and assured by you."

13. Simultaneously, plaintiff got a legal notice sent to defendant No. 1 January 18, 1995 (copy at page 50) calling upon it to pay the sum of Rs. 12,16,000/- Along with interest. Covering letter dated 20th January, 1995 with a copy endorsed to defendant No. 1 sent Along with pay order and four cheques dated 19.01.95, 29.01.95, 11.02.95, 28.02.95 & 10.03.95 in the sum of Rs. 2,00,000/- each by defendant No. 2 to the plaintiff is at page 53. Last but one para of this letter which is material runs thus:-

"The final installment which shall include the balance amount of Rs. 2,16,000/- and all interest, cost and other charges, would be paid by us by pay order on 20th March, 1995, upon receipt of a letter from your advocate relieving Mardia Copper Products Limited & us of the liabilities towards the above said Hundi."

14. Indisputably, four cheques sent Along with said covering letter dated 20th January, 1995 on being presented to the bank were dishonoured. In the legal notices dated 5.12 (ought to have been January) 95 at page 34 and 31st January, 1995 at page 55 sent to the plaintiff, defendant No. 1 denied its liability to pay the aforementioned amount Along with interest. Letter dated 31st December, 1995 sent by the plaintiff to Mardia Electronics Ltd. defendant No. 2 with a copy endorsed to Mardia Copper Products Ltd. defendant No. 1, is placed at page 43 and it reads thus : -

"We are in receipt of a copy of your letter bearing No. MEL/AC/94 dated Dec. 17, 1994 addressed by you to Mardia Copper Products Ltd. whereby you have undertaken and agreed to pay and discharge the liability towards us accrued on account of us having discounted the hundi as aforesaid for a sum of Rs. 12,16,000.00/- discounted at your and Mardia Copper''s request and representation. By the said letter, you have very conveniently relieved Mardia Copper Products Ltd. of the said liability.

Kindly do note that the hundi under reference when presented to us for payment was drawn with recourse to the drawer and to secure which said payment, Mardia Copper Products Ltd. drew a cheque in our favor in the sum of Rs. 12,16,000/-, which cheque on presentation did not encash. Hence, we shall not relieve Mardia Copper Products Ltd. of the said liability till we do not receipt all said payment with all interest for such delayed period."

15. A combined reading of the correspondence referred to above prima facie indicates that the plaintiff in the first instance had agreed to receive the amount in question from defendant No. 2 and it had not at all relieved defendant No. 1 of its liability to pay it if the same was not paid by defendant No. 2. This much is in regard to the second submission.

16. Turning to the first submission, the same is primarily based on the plea taken by defendant No. 1 that based on the persuasion of Ashok Mehta who desired to raise some funds aforesaid Sunil Mardia signed blank hundi and the cheque in July/August 1994; and that as per the assurance of defendant No. 2 amount of the hundi on being discounted was to be handed over to defendant No. 1 by defendant No. 2. However, defendant No. 2 fraudulently retained the entire amount of the hundi in question and this facts came to the notice of Sunil Mardia only on receipt of the letter dated 17th November, 1994 from the plaintiff. Sunil Mardia, thus, admits his signatures on the hundi dated 17th August, 1994 and also the cheque dated 15th November, 1994 in the sum of Rs. 12,16,000/-. It may be noticed that there is not the slightest whisper in any of the correspondence placed on the record about the signing of the said hundi and the

cheque by Sunil Mardia while they were blank. It was for the first time that this plea was taken in the application for leave to defend by defendant No. 1. It is not indicated in the application for leave to contest nor defendant No. 1 has placed on record any document whosoever to show that any action was initiated by Sunil Mardia against Ashok Mehta or defendant No. 2 for having fraudulently misappropriated the entire amount of Rs. 12,16,000/- after getting the hundi discounted from the plaintiff. Ordinarily, one does not pass on a blank negotiable instrument after appending signature thereon. In the decision in Santosh Kumar Vs. Bhai Mool Singh, which was followed in Mechelec Engineers and Manufacturers Vs. Basic Equipment Corporation, , it was held by the Supreme Court that if a Court is of the opinion that the defense taken by the defendant is not bona fide, then it can impose conditions and is not tied down to refusing leave to defend. Taking note of the ratio in these decisions and the discussion made above, defendant No. 1 is permitted to contest the suit subject to its furnishing bank guarantee for the suit amount and the cost to the satisfaction of the Registrar of this Court within four weeks'' from today.

17. Since defendant No. 2 was served with the summons for judgment on 9.9.96 and has not applied for leave to defend the suit, the suit is decreed against it for recovery of Rs. 12,28,800/- with cost and interest pendente lite and future on Rs. 12,16,000/- @ Rs. 12% per annum. In case defendant No. 1 fails to furnish the bank guarantee within the time allowed, decree will also stand passed against it on identical terms.